Judgments of the Administrative Tribunal of the International Labour Organization:

87th Session

(May-July 1999)

International Labour Office
Geneva

Judgments of the ILO Administrative Tribunal: 87th Session

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ISSN 0378-7362

First published in 1999

Annual subscription: 70 Swiss francs

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International Labour Organization (ILO), including the International Training Centre
World Health Organization (WHO), including the Pan American Health Organization (PAHO)
International Telecommunication Union (ITU)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
World Meteorological Organization (WMO)
Food and Agriculture Organization of the United Nations (FAO)
European Organization for Nuclear Research (CERN)
World Trade Organization (WTO)
International Atomic Energy Agency (IAEA)
World Intellectual Property Organization (WIPO)
European Organization for the Safety of Air Navigation (Eurocontrol)
Universal Postal Union (UPU)
European Southern Observatory (ESO)
Intergovernmental Council of Copper Exporting Countries (CIPEC)
European Free Trade Association (EFTA)
Inter-Parliamentary Union (IPU)
European Molecular Biology Laboratory (EMBL)
World Tourism Organization (WTO)
European Patent Organisation (EPO)
African Training and Research Centre in Administration for Development (CAFRAD)
Intergovernmental Organisation for International Carriage by Rail (OTIF)
International Center for the Registration of Serials (CIEPS)
International Office of Epizootics (OIE)
United Nations Industrial Development Organization (UNIDO)
International Criminal Police Organization (Interpol)
International Fund for Agricultural Development (IFAD)
International Union for the Protection of New Varieties of Plants (UPOV)
Customs Co-operation Council (CCC)
Court of Justice of the European Free Trade Association (EFTA Court)
Surveillance Authority of the European Free Trade Association (ESA)
International Service for National Agricultural Research (ISNAR)

International Organization for Migration (IOM)
International Centre for Genetic Engineering and Biotechnology (ICGEB)
Organisation for the Prohibition of Chemical Weapons (OPCW)
International Hydrographic Organization (IHO)
Energy Charter Conference (ECC)
International Federation of Red Cross and Red Crescent Societies

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

***In re* Palma (No. 3)**

Judgment 1843

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 25 February 1998, the ESO's reply of 11 May, the complainant's rejoinder of 15 June and the Observatory's surrejoinder of 20 July 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian, served on the staff of the Observatory from 1 September 1989 to 31 August 1995. Further information about his career and facts relevant to this case are set out in Judgment 1665 of 10 July 1997 on his complaint against the European Organization for Nuclear Research (CERN) and in Judgment 1718 of 29 January 1998 on his first complaint against the ESO.

By a letter of 29 October 1997, the complainant sent the ESO four medical certificates which, according to him, showed "the discovery of a new disability ... of professional origin and coming from [his] activity at ESO". On 17 November, he sent two further certificates and requested the Director General to convene a Rehabilitation Board. The head of Administration replied on behalf of the Director General on 5 December that a Rehabilitation Board could not be convened for a former staff member and that the causal link between his duties at the ESO and his illness had not been demonstrated by the certificates which he had sent.

By a letter of 11 December 1997, the complainant asked for the discussion on the subject to be kept pending while awaiting the judgment of the Tribunal on his first complaint against the ESO. On 10 February 1998, he requested the Director General to convene a Rehabilitation Board. By a letter dated 13 February the head of Administration rejected his request on behalf of the Director General. This is the impugned decision.

B. The complainant contends that the refusal to convene a Rehabilitation Board constitutes a breach of the Staff Rules and Regulations of the ESO. He submits that the Rules of the Pension Fund of CERN, to which the staff of the ESO is affiliated, provide for a period of ten years from the date of the end of the contract of employment during which a former member of the staff may claim for an occupational illness. He considers that he has medical proof that the discovered disability originated in 1990 when he worked at the ESO and has worsened since then.

The complainant asks the Tribunal to quash the impugned decision, order the convening of a Rehabilitation Board and grant him costs.

C. In its reply, the Observatory develops three pleas. Firstly, the complainant did not attend the compulsory medical examination "on termination of appointment" which he had been requested to undergo. The 1983 version of Article R II 4.20b) of the Staff Regulations, which became Article R II 4.21b) as from 1993, states that in such a case the staff member is disqualified from claiming any compensation for occupational injuries or illness. Moreover, the Staff Regulations do not envisage the convening of a Rehabilitation Board for former members of the staff. Finally, the medical certificates presented do not establish a causal link between the complainant's service at the ESO and his current state of health.

D. In his rejoinder, the complainant contends that the Director General should have consulted the Joint Advisory Appeals Board before taking the impugned decision and accuses the Observatory of bad faith. He recalls that his contract ended on 31 August 1995, but that he had been placed on special leave on 28 June. He considers that he could not therefore comply with the Observatory's request, made by a letter dated 30 June 1995, to undergo a medical examination "before [his] last day of work". He adds that the Staff Regulations make no distinction between "active" and former members of the staff and that Judgment 1665 ordered the convening of a "new Rehabilitation Board".

The complainant further accuses the Observatory of having drawn the wrong conclusions from the medical certificates and of having committed errors of fact and of law. He accuses it of perjury and of breaches of fundamental human rights.

E. In its surrejoinder, the Observatory explains that "the last day of work" obviously referred to the last day of the contract, which went up to 31 August 1995. For the rest, it presses its pleas and reaffirms its arguments.

CONSIDERATIONS

1. The complainant joined the ESO on 1 September 1989. By a letter of 26 January 1995, the head of Personnel gave him notice that his contract would not be renewed when it expired on 31 August 1995. By another letter dated 30 June 1995 the head of Personnel informed him of his entitlements to terminal indemnities and of other administrative formalities connected with the ending of his contract; he was asked to take the twenty days that remained of his annual leave, failing which his "last working day" would be 2 August; and he was also told:

> "Before your last day of work with the Organisation you should undergo the medical examination foreseen in Article R II 4.20b) of the Staff Rules and Regulations."

2. A staff member is required to undergo a compulsory medical examination on termination of appointment pursuant to the 1983 version of Article R II 4.19 and 4.20b) of the Staff Regulations, which became Articles R II 4.20 and 4.21b) in 1993, which provide:

> "4.19 The Director-General may at any time require a member of the personnel to undergo an examination by a medical practitioner designated by the Organization.
>
> 4.20 This examination shall be obligatory, particularly:

(a) …

(b) on termination of appointment. Failure to be examined shall disqualify a member of the personnel from any compensation in connection with injuries sustained or illness contracted as a result of or in connection with his period of service."

3. However, in an earlier letter dated 28 June 1995, the complainant had already been placed on immediate special leave pending investigations into certain allegations against him. In a letter from a senior personnel officer of 20 July 1995, his request to be allowed to return to work was refused because of those investigations. He was also told that, despite the seriousness of the facts then known, the ESO would refrain from disciplinary action as his contract was ending on 31 August. Thus the last day on which he actually worked was 28 June.

4. The complainant said nothing then about any difficulty in presenting himself for a medical examination whilst being on leave. Furthermore, in a letter dated 5 July 1995 he said that he would furnish copies of medical certificates as to his actual state of health. However, he neither underwent the required medical examination nor submitted such medical certificates.

5. By letters dated 29 October and 17 November 1997 (to which he annexed six medical certificates, all issued in 1997) the complainant told the Director General that he was suffering from a new disability which he claimed was attributable to his employment at the ESO. The complainant had been treated, since 1990, by a Dr Koerner, from whom there was no certificate; and from August 1997 by his successor, Dr Siedow, an orthopaedic specialist, whose medical certificate of 2 September 1997 states:

> "[the complainant] has been a patient at this practice since 26 November 1990, and has been treated by me since 12 August 1997. The painful symptoms were first diagnosed at the end of 1990 and proved to be caused by a slipped disc at L.5/S1 level. The condition is degenerative and leads to permanent disability. Sedentary professional activity with inadequate rest periods has doubtless worsened the degenerative condition; the intervertebral disc stress surely dates back to 1990 …"

The complainant has produced no evidence that his condition was brought to the notice of the ESO at any time prior to the termination of his contract.

6. In his internal appeal of 17 November 1997 the complainant asked the Director General to appoint a Rehabilitation Board to deal with his claim. Articles R II 1.25 to 1.27 of the Staff Regulations provide:

> "1.25 ... any member of the personnel shall be deemed to be a handicapped person when he is declared to be such by the Rehabilitation Board and recognized as such by the Director General.
>
> 1.26 The Director General shall appoint the Rehabilitation Board referred to above. The Board shall examine the cases and recommend the measures to be taken concerning them on the basis of conditions and terms as defined in Annex R B 4.
>
> 1.27 When a member of the personnel is handicapped as a result of an illness or accident arising out of or in the course of his duties ... he shall be assigned to duties corresponding to his physical capacities."

Annex R B 4 authorises the Board to make recommendations:

> "- concerning the nature (occupational or otherwise) of an accident or illness;
> - concerning rehabilitation and incapacity:
>   a) for the recognition of handicaps;
>   b) for the rehabilitation of handicapped persons, their retention in their posts and, where appropriate, the conditions under which they are to be dismissed on grounds of incapacity confirmed by a medical certificate;
> - concerning disability."

7. On 5 December 1997 the head of Administration wrote to the complainant on the Director General's behalf refusing to appoint a Rehabilitation Board. The complainant asks the Tribunal to quash that decision, to order the Director General to appoint a Rehabilitation Board and to award him costs.

8. The ESO contends, first, that the failure of the complainant to undergo the mandatory medical examination prior to the termination of his contract precludes him from claiming compensation for a work-related injury or illness.

9. The complainant submits that by the letter of 30 June 1995 he was required to undergo a medical examination before his "last day of work", but that he had already been placed on special leave before he received that letter. Thereafter the ESO refused to allow him to return to work. In this way it was the ESO that made it impossible for him to undergo the medical examination in time.

10. The ESO counters that the Staff Regulations plainly state the consequences of not undergoing a medical examination prior to termination of a contract, and that the complainant must be deemed to know the requirements of those Regulations: see Judgment 1141 (*in re* Tomson), under 18, and Judgment 1734 (*in re* Kowasch), under 3(e). The letter of 30 June drew his attention to the Staff Regulations, and although the head of Personnel referred to the "last day of work" it was obvious that he meant the termination of the complainant's contract.

11. A medical examination at the time of termination is not a mere formality: it is intended to establish with some degree of certainty – in the interests of both parties – a staff member's state of health upon termination. In any event, if the complainant really believed that the ESO – by suddenly sending him on special leave – had made it impossible for him to undergo the medical examination in time, he ought to have pointed that out as soon as he received the letter of 30 June, and requested an opportunity to comply with the Staff Regulations. Instead, he undertook to furnish medical certificates as to his state of health, but even that he failed to do at the material time.

12. The Tribunal holds that Article R II 4.20b) of the Staff Regulations disqualified the complainant from making a claim for compensation in respect of a work-related injury or illness discovered after termination, and the Director General was justified in not appointing a Rehabilitation Board.

13. The ESO further contends that the Staff Regulations provide for the appointment of a Rehabilitation Board only in respect of members of the personnel – not for former members of staff.

14. The complainant argues that the phrase "member of the personnel" in the Staff Regulations is wide enough to include both present and former staff members.

15. Articles R II 1.25 to 1.27 of the Staff Regulations show that the function of a Rehabilitation Board is to consider whether a "member of the personnel" is handicapped; and, if so, to make recommendations as to his rehabilitation, his retention in service (in the same or another post), or his dismissal on the ground of incapacity. The Tribunal holds that Articles R II 1.25 to 1.27 of the Staff Regulations do not apply to former staff members, and that therefore the Director General was not obliged to appoint a Rehabilitation Board to deal with the complainant's claim.

16. Those conclusions make it unnecessary to consider the ESO's third contention that the medical certificates furnished by the complainant do not establish a causal link between his service and his present state of health. However, the Tribunal must place on record that the ESO stated when the claim was first made, and reiterated in its reply, that it is prepared to examine the complainant's claim if he provides substantiated evidence of a link between his duties at ESO and his state of health.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-SEVENTH SESSION

***In re* Palma (No. 4)** **Judgment 1844**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 3 March 1998, the ESO's reply of 8 May, the complainant's rejoinder of 29 May and the Observatory's surrejoinder of 10 August 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian, served on the staff of the Observatory from 1 September 1989 to 31 August 1995. Further information about his career and facts relevant to this case are set out in Judgment 1665 of 10 July 1997 on his complaint against the European Organization for Nuclear Research (CERN) and in Judgment 1718 of 29 January 1998 on his first complaint against the ESO.

By a letter of 12 February 1998 addressed to the head of Administration of the ESO, the complainant requested payment of five months' salary in lieu of notice of the non-renewal of his contract. He referred to a letter from the head of Personnel, dated 26 January 1995, informing him that his contract, which came to an end on 31 August 1995, would not be renewed. He considered that he was entitled to twelve months' notice instead of the seven months that he received. By a letter dated 13 February the head of Administration rejected his request on behalf of the Director General. This is the impugned decision.

B. The complainant contends that he has the "administrative right" to "finalize" all outstanding accounting and administrative procedures relating to his previous employment. He submits that, in accordance with two internal memoranda dated 13 December 1976 and 21 October 1988, he should have received one year of notice of the non-renewal of his contract, as was granted to colleagues who were in a similar situation to his. He therefore considers that he has been subject to discrimination. He also cites in support of his plea for compensation Convention No. 158 of the International Labour Organization concerning Termination of Employment at the Initiative of the Employer.

He contends that he had advised the head of Personnel, by a letter of 5 July 1995, that while awaiting the judgment of the Tribunal on the non-renewal of his contract, he considered any indemnity received as "preliminary". He also contends that the Observatory, by a letter of 15 January 1998, agreed to extend the period for claiming payment of indemnities for up to three months following the announcement of Judgment 1718.

The complainant asks the Tribunal to quash the impugned decision, to order the payment of a sum in lieu of notice of the non-renewal of his contract and to award him costs.

C. In its reply, the Observatory notes that the complainant appealed against the decision not to renew his contract to the Tribunal on 19 July 1995, but later withdrew his complaint. The Observatory submits that the complainant, who chose not to appeal, can no longer plead flaws in that decision. His complaint is therefore irreceivable.

It observes that the letter of 15 January 1998 concerns only removal expenses and is not therefore material to this case.

D. In his rejoinder, the complainant maintains that his complaint is receivable and he says that his letter of 5 July 1995 imposed a "moratorium" on all issues relating to the indemnities to which he was entitled. He refutes the contention by the Observatory that he did not appeal against the decision not to renew his contract and he endeavours to show that he appealed on 31 May 1995, as soon as he found out the reasons for the decision.

He also maintains that the decision to bring an end to his employment could not be the subject of an internal appeal but had to be referred directly to the Tribunal and denounces the bad faith of the Observatory. Finally, he submits that his request for compensation in lieu of a notice period is not the same as the challenge to the decision not to renew his contract. Whether or not he appealed against that decision is therefore immaterial to the receivability of this complaint.

E. In its surrejoinder, the Observatory reaffirms its arguments. It agrees that the decision to bring to an end the contract of the complainant had to be referred directly to the Tribunal, but observes that this was not done. It adds that, in accordance with the Staff Rules and Regulations, the complainant was entitled to six months' notice of the expiry of his contract.

CONSIDERATIONS

1. The complainant joined the ESO on 1 September 1989. By a letter of 26 January 1995, the head of Personnel gave him notice that, on the basis of the recommendation of the Contract Advisory Committee, the Director General had decided not to offer him an indefinite contract and not to renew his three-year contract when it expired on 31 August 1995.

2. On 3 May 1995 the complainant told the head of Administration that there were no records in his personal file relevant to the decision not to renew his contract and asked that the relevant documents be included in his personal file so that he could examine them and decide upon a possible appeal. On 8 May the head of Personnel informed him that this had been done on 3 May, the delay being attributed to "backlog in Personnel Administration".

3. Articles VI 1.01 to 1.04 of the ESO Staff Rules give every member of staff a right to appeal to the Director General against any decision taken by him other than not to renew or extend a contract.

4. The complainant appealed to the Director General by a letter dated 31 May 1995 in which he acknowledged that he could not in fact appeal internally, but was entitled to go directly to the Tribunal. The Director General replied on 13 June that appeals had to be lodged within a given period of time after notification of the disputed decision; that this period had expired; and that no appeal lay against the decision not to grant him an indefinite contract.

5. On 19 July 1995 the complainant lodged a complaint with the Tribunal challenging the decision of 26 January, which he later withdrew on 22 December 1995.

6. On 12 February 1998 the complainant wrote to the head of Administration alleging that he had only been given seven months' notice of termination though entitled to twelve. He claimed five months' salary in lieu of notice. On 13 February the head of Administration refused on the Director-General's behalf to reopen any issues relating to his contract which had terminated in August 1995.

7. The complainant thereupon lodged this complaint on 3 March 1998. He contends that the letter of 26 January 1995 gave no reason for the decision not to renew his contract; that the relevant documents were not placed in his personal file until 3 May 1995; and that the practice of the ESO was to give one years' notice of non-renewal. It is unnecessary to consider these arguments as the Tribunal upholds the ESO's plea that the complaint is irreceivable.

8. The complaint relates to the insufficient notice of non-renewal of the complainant's contract. The complainant's only right of appeal was to the Tribunal, and under Article VII(2) of its Statute a complaint should have been lodged within ninety days. Even on the assumption that a new time limit commenced on 3 May 1995 – the date at which the reason for the impugned decision was made known to the complainant (see Judgment 1230 (*in re* Filatkin) under 3) and the ESO made the relevant documents available to him – a complaint should nevertheless have been lodged within ninety days of that date. The present complaint is thus more than two years out of time.

9. The complainant argues that by a letter dated 15 January 1998 the head of Administration, on behalf of the Director General, agreed to extend the period within which the complainant could claim indemnities by up to three months after the Tribunal's ruling on his first complaint (Judgment 1718 of 29 January 1998). However, this letter was clearly restricted to his claim for removal expenses and was quite unrelated to the present complaint. It neither constituted a waiver of the ESO's right to rely on the time limit, nor did it have the effect of giving rise to a new one.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

In re **Palma (No. 5)** **Judgment 1845**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 18 June 1998, the ESO's reply of 16 October, the complainant's rejoinder of 12 November and the Observatory's surrejoinder of 14 December 1998;

Considering Articles II, paragraphs 5 and 6, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian, served on the staff of the Observatory from 1 September 1989 to 31 August 1995. Further information about his career and facts relevant to this case are set out in Judgment 1665 of 10 July 1997 on his complaint against the European Organization for Nuclear Research (CERN) and in Judgment 1718 of 29 January 1998 on his first complaint against the ESO.

On 23 September 1997, the ESO issued a vacancy notice for an assistant to the head of Administration. The complainant applied for the post by a letter of 20 October. He indicated that he was "fully qualified" for the post, asked to be recruited as a "handicapped" person and warned the

Observatory against any discrimination. He suggested that the Observator first select from the other candidates and then put the best of them i competition with him before an "independent board of selection agreed b arbitration/Tribunal". He specified the fields in which assistance should b given to the head of Administration. On 7 November, he completed th application form, explaining that his departure from the Observatory in 199 was due to a "real conspiracy" by the former heads of Administration and Personnel, as well as his first-level supervisor. On 10 November 1997, the Observatory acknowledged receipt of his application and, on 15 February 1998, informed him that he would not be offered the post.

By a letter dated 28 March 1998, the complainant appealed against the decision not to offer him the post. He contended in particular that he had not been interviewed and that his disability had not been taken into consideration. Not having received a reply to his letter he challenges the implicit decision to reject his appeal.

B. The complainant says that he has not ceased since 1995 to apply for "reassignment" to the Observatory as a handicapped person. He submits that his qualifications, experience, state of health and his warning against any attempt to discriminate against him obliged the Observatory to take his application into account and call him for an interview. Instead, his application was rejected without any explanation, which, he maintains constitutes a violation not only of the ESO's Staff Rules and Regulations, but also of human rights as recognised by the International Labour Organization (ILO) and the United Nations.

The complainant asks the Tribunal: (1) to quash the impugned implied decision and consequently to order the Observatory to reopen the selection process for the post in question, unless another remedy can be found, and to refrain from any discrimination against him in the future; (2) to award him moral damages and costs; and (3) to "denounce" to the ILO, if it has the competence to do so, the violations that he is denouncing so that the ILO may impose on the Observatory or its member States a large financial penalty.

C. In its reply, the Observatory explains that the Selection Board only examines applications which have been chosen by the Administration. However, the Administration concluded that the complainant did not have the necessary qualifications for the post and, in particular, that the application form that he had completed showed flaws in his knowledge of English and "a serious lack of judgment". It also took into account the evaluation of his performance when he was in the service of the Observatory. It adds that his first and last claims are not receivable, as the Tribunal does not have the competence to make such orders.

D. In his rejoinder, the complainant contends that the Observatory's reply injures his professional reputation. He reports that, during his period of service with the Observatory, his performance was appreciated and he had obtained a promotion. He contends that he was the victim of discrimination by reason of his nationality and disability and believes that it would have been in the interests of the Observatory to use the knowledge that he had acquired in its service. He accuses it of bad faith and of "breach of due process".

The complainant changes his claims. He seeks the quashing of the impugned decision, but no longer specifies the consequences, and the denunciation of his case to the ILO. He maintains his claims to damages and costs.

E. In its surrejoinder, the Observatory submits that decisions concerning the appointment of staff members are within its discretionary authority and that the Tribunal therefore only exercises a limited review over the procedure. It says that the correct procedure was followed and that the complainant does not adduce any evidence to the contrary.

CONSIDERATIONS

1. The complainant joined the ESO on 1 September 1989. By a letter of 26 January 1995 the head of Personnel gave him notice that, on the basis of the recommendation of the Contract Advisory Committee, the Director General had decided not to offer him an indefinite contract and not to renew his three-year contract when it expired on 31 August 1995.

2. On 19 July 1995 the complainant lodged a complaint with the Tribunal challenging the non-renewal of his contract, which he withdrew on 22 December 1995.

3. In 1994, whilst working at the ESO, the complainant felt a sudden pain in his left eye, which resulted in permanent loss of vision in that eye. In July 1995 the ESO Rehabilitation Board set the "degree of disability" and loss of earning capacity at 39 per cent. As set out in Judgment 1665 (*in re* Palma) under 4 and 5, the CERN Pension Fund awarded him, initially, a small "unsuitability pension", and upon appeal "*ex gratia* benefits equal to a partial incapacity pension of 40 per cent".

4. The complainant says that in August 1997 it was discovered that he was suffering from a new disability – an intervertebral disc prolapse – of which he informed the Director General in October 1997 (see Judgment 1843 *in re* Palma (No. 3), delivered today, under 5).

5. In response to a vacancy notice issued on 23 September 1997, the complainant applied for the post of assistant to the head of Administration. In a letter dated 20 October he submitted that his qualifications exceeded the ESO's expectations, and requested that he be appointed, and that account should also be taken of his disabilities. He urged the ESO not to discriminate against him – because the matter might come before the Tribunal – and he suggested that the ESO should first select the best candidate from among all the other applicants and then set up an independent selection board to decide between that candidate and himself on the basis only of capabilities and skills as demonstrated in certain areas which he specified.

6. On 10 November 1997 the ESO acknowledged receipt of the complainant's application, stating that he would be contacted if required to attend an interview. He was not called for an interview and on 15 February 1998 the head of Personnel informed him that he had not been selected.

7. The complainant appealed to the Director General on 28 March 1998, and not having received a reply, lodged this complaint on 18 June 1998. He asks the Tribunal:

(a) to quash the Observatory's implied negative decision and to order the ESO, unless it offers him an alternative and effective remedy, to reopen the selection procedure, and to refrain from further discrimination against him;

(b) to award him moral damages and costs; and

(c) to denounce to the ILO the ESO's wilful violation of his human rights in order that the ILO may impose a punitive sanction on the ESO or its member States for the proved breach of international conventions.

8. The complaint also contains various allegations as to the way he was treated in 1995. The Tribunal holds that these allegations are not receivable, because the complainant failed to apply to the Tribunal within the period laid down in Article VII(2) of the Statute of the Tribunal.

9. The question arises whether the Tribunal lacks competence in regard to his claims because the complainant is no longer a staff member of the ESO.

10. The Tribunal has competence, *ratione personae*, to entertain the complaint because under Article II(6) of its Statute the Tribunal is open to a former staff member.

However, Article II(5) restricts the competence of the Tribunal, *ratione materiae*, to complaints alleging the non-observance, in substance or in form, of the terms of appointment of a staff member or of the provisions of the applicable Staff Regulations.

On expiry of the complainant's contract, he ceased to be a staff member. His complaint, concerning his non-selection, does not involve any allegation of the violation of any rights which he enjoyed under his contract or the Staff Regulations insofar as they continued to apply to him. The Tribunal therefore can neither entertain the complaint (see Judgment 1509, (*in re* Zhu), under 16, Judgment 1554 (*in re* Tögl), under 10, and Judgment 1707 (*in re* Broere-Moore No. 6), under 7), nor his consequential claims to moral damages and costs.

11. The complainant's other claims are for relief which the Tribunal is not competent to grant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Mark Fernando, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

MARK FERNANDO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-SEVENTH SESSION

***In re* Kybritis** **Judgment 1846**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Nicholas Kybritis against the European Patent Organisation (EPO) on 28 May 1998 and corrected on 16 June, the EPO's reply of 1 September, the complainant's rejoinder of 5 November and the Organisation's surrejoinder of 3 December 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is Greek and was born in 1965, joined the staff of the European Patent Office, the EPO's secretariat, in 1991 as a lawyer. At the material time he held grade A2. He took one year's unpaid leave from 15 August 1994 and resigned on 15 August 1995.

Under Article 81(1) of the Service Regulations the complainant, as a permanent employee, was entitled on leaving the EPO "to reimbursement of expenses actually incurred for the removal of household and personal effects". He accordingly sent in a claim for reimbursement of removal expenses. The Office approved the claim on 30 June 1994 as well as an estimate of 15,524 German marks submitted by a German removal firm, Cramer KG, for the cost of moving his belongings from Munich to Monte Carlo.

The final invoice came to 15,570 marks. A Monegasque company was involved in transporting the effects from the French border to Monte Carlo and during the move some of the complainant's possessions were damaged or lost. In a fax of 4 August 1994 Cramer assured him they would "take full responsibility" for any damage caused. The complainant estimated the damage at 6,314 marks. Cramer's insurers, however, set the damage at 4,000 marks, so when he paid the removal firm's invoice the complainant held back 2,314 marks to cover his loss. He says that he took Cramer's continued silence to be tacit acceptance of his action.

In a letter to the complainant of 22 August 1995 the head of the Remuneration Department agreed to refund him the sum of 13,256 marks. The Office would, he said, only reimburse him the shortfall of 2,314 marks when he had either paid the sum to the removal firm or when the firm had agreed that the part he withheld represented "compensation for damages or out-of-pocket expenses" he had incurred. But the complainant claimed the outstanding sum from the Office by a letter of 5 September 1995. An official from the Remuneration Department told him in a fax of 1 February 1996 that the Office had refunded to him the amount that was backed up by proof of payment and reiterated the EPO's stand on the conditions for the refund.

His claim went to the President of the Office and the Principal Director of Personnel replied on his behalf on 22 May 1996 saying that the Office could not reimburse the shortfall to him unless he paid Cramer beforehand or unless the firm agreed to waive payment. In a fax of 31 May to the Director the complainant indicated that the firm had previously "assumed joint liability together with the insurance company with regard to the coverage of [his] sustained damage" and indicated his intention to file an internal appeal if the Office did not reimburse him. By a letter of 3 June the Principal Director of Personnel told him that under a relevant German regulation only a counterclaim acceptable to the other party could be deducted. The Director continued that in his case the removal firm had neither agreed to offset the amount nor renounced their claim to it and the Office would only refund the balance to the complainant if the conditions for refund were met.

On 28 June 1996 the complainant lodged an appeal with the Appeals Committee against the decision to withhold the refund. In its report of

8 January 1998 the Committee recommended the rejection of his appeal. In a letter of 20 February 1998, received by the complainant on 5 March and which he impugns, the Director of Personnel Development informed him that the President had decided to reject his appeal.

B. The complainant alleges that in refusing him reimbursement of the contested sum the EPO acted in breach of general principles of law such as "legal certainty" and good faith.

He contends that there was a contradiction in the stance the EPO took and it did not keep promises made to him. It had agreed to decide in favour of the complainant if there was tacit agreement by the removal firm to offset the amount but later said that the firm's agreement was required. He was also told that if after three years the firm had not opted for legal redress then the EPO would consider that it had tacitly agreed to the offset. To date no legal proceedings have been initiated by the firm, so the conditions for reimbursement are now met.

By insisting that he first had to pay the removal firm in full, after all he had suffered at their hands, the EPO changed tack. It interpreted the rules on reimbursement too narrowly, failed to protect his interests and paid no heed to the spirit of the rules.

He seeks: (1) reimbursement of the outstanding amount of the invoice for his removal expenses in the sum of 2,314 marks with "default interest" - of 28.5 per cent per annum - "the annual average default rate according to Greek law" as from 1 August 1995 or 30 January 1996 at the latest; (2) an award of 5,000 marks in moral damages; (3) 5,000 marks in costs for his internal appeal; and (4) 5,000 marks in costs for his appeal to the Tribunal.

C. In its reply the EPO contends that the complaint is irreceivable: the internal appeal was out of time. The letter of 22 May 1996 from the President, considered by the Appeals Committee to be the challenged decision, merely confirmed the thrust of the letter of 1 February 1996, which was the "definitive" decision.

The complainant's three requests for sums of 5,000 marks are unfounded as he seeks redress on three counts for the same alleged damage resulting from the Organisation's refusal to pay him 2,314 marks.

The EPO notes that in his internal appeal, he claimed "default interest" at 22 per cent, whereas he claims 28.5 per cent in his complaint to the Tribunal.

On the merits the defendant contends that the complaint is unfounded. The complainant's allegations that the EPO went back on a promise to reimburse him are "irrelevant". From the outset the EPO told him that reimbursement of his removal costs was not possible unless he supplied either evidence of expense incurred or proof that the removal firm accepted that the payment he withheld represented "compensation for damages or out-of-pocket expenses" incurred by him.

The conditions for reimbursement were not met, not only because the removal firm did not give its agreement to the deduction, but also because, in a letter of 5 February 1997, it set a deadline and threatened legal action. So far the complainant had failed to provide evidence of the firm's agreement to the set-off amount.

It denies acting contrary to good faith or interpreting the rules narrowly. The provisions of Article 81(1) and (3) of the Service Regulations and Articles 45 and 46 of the Financial Regulations are clear. Article 81(1) provides for reimbursement of "expenses actually incurred".

D. In his rejoinder the complainant maintains his claims and notes that the Appeals Committee ruled that his appeal was lodged in time.

The removal firm's insurers carried out their damage assessment on 31 August 1994 without visiting the complainant or examining his evidence. The firm did not honour their undertaking to assume full liability for the damage they had caused. Their insurance company covered only part of the damage.

E. In its surrejoinder the EPO affirms that it did not deviate from its initial stand. It told the complainant all along under what conditions he would be reimbursed. The matter must be settled between Cramer, possibly its insurers, and the complainant; the EPO would have no competence to comment on any legal proceedings that may arise between the parties. The removal contract is subject to German law. At present the complainant is suffering no prejudice as by withholding payment he is reimbursing himself fully for the alleged damage, and cannot also claim reimbursement from the EPO. His request is therefore unfounded.

CONSIDERATIONS

1. The complainant joined the European Patent Organisation as a lawyer in 1991. He was granted one year's unpaid leave from 15 August 1994 and he resigned on 15 August 1995. He requested reimbursement of his removal costs from Munich to Monte Carlo under Article 81 of the Service Regulations. On 30 June 1994 the Organisation agreed to the estimate of 15,524 German marks from the removal firm, Cramer KG; the final invoice was for 15,570 marks.

2. After the removal, which began on 25 July 1994, the complainant notified Cramer that several items had been damaged while they were being transported by a Monegasque subcontractor. By fax dated 4 August 1994, Cramer agreed to take full responsibility for any damage caused. The transport insurers agreed to grant 4,000 marks in compensation, 2,314 marks less than the cost of damage estimated by the complainant (which he subsequently withheld). The amount of 4,000 marks was paid by the insurer to Cramer.

3. In August 1995 the Organisation reimbursed the complainant 13,256 marks. In a letter dated 22 August 1995, the amount is shown as being made up of direct and indirect payments as follows:

2,491 marks paid to the Monegasque transport company.
6,765 marks as part payment to Cramer KG.
4,000 marks for the insurance claim, paid by the insurer to Cramer KG.

The letter stated that the outstanding balance could only be refunded when it had been paid or when Cramer accepted that the amount represented compensation.

4. By a letter dated 5 September 1995 the complainant asked the Organisation to reimburse him 2,314 marks, being the outstanding balance

from the sum of 15,570 marks. He said the lack of response from Cramer constituted tacit acceptance of his action.

5. After several phone calls and following a letter from the complainant dated 30 January 1996, the Office's Remuneration Department replied by fax on 1 February 1996 to say that he was only entitled to claim a refund for costs actually incurred. It stated that an additional refund would be possible only if he made further payments or if the removal firm agreed to a set-off and added "please enclose the relevant proof".

6. The Organisation received a copy of a letter from Cramer to the complainant dated 5 February 1996 asking him to repay the outstanding 2,314 marks by 29 February and threatening to take legal action in default of payment.

7. The complainant replied to the Remuneration Department on 5 February 1996. He said that if the Department's position remained unchanged after considering all the facts, he would request that the matter be brought before the President for a reasoned individual decision under Article 106. He asked to be informed about the form, procedure and time limits to be observed in filing a valid request for an individual decision. In a fax dated 6 February 1996 he put forward more arguments and stated his intention not to pay any money to the transport firm. He concluded by saying that he persisted in all his claims and asked for a reply after his request had been forwarded to the President.

8. By a letter dated 22 May 1996, the Principal Director of Personnel wrote to the complainant on behalf of the President. He said the complainant's request for reimbursement of the remaining sum of 2,314 marks could not be granted, and cited Article 81(1) of the Service Regulations. In August 1995, he continued, the Office had reimbursed the amount of the invoice from Cramer as fully as possible; the remaining sum would be reimbursed as soon as the complainant had paid Cramer or as soon as the firm agreed to set it off.

9. The complainant replied by a fax dated 31 May 1996 setting out further arguments. He asked whether the President's decision was final

pursuant to Article 106. He said he intended to lodge an internal appeal against it and requested information about the relevant procedure.

10. The Principal Director of Personnel replied on 3 June 1996 enclosing an extract of the pertinent German regulation. He said the company had neither agreed to a set-off of the debt nor renounced its claim to the outstanding balance, but rather had insisted on receiving payment in full. The letter concluded by stating that the Office was willing to refund the balance only if the conditions for the refund were met.

11. On 28 June 1996 the complainant filed an internal appeal against the President's decision of 22 May 1996. The Appeals Committee in its report dated 8 January 1998 rejected the Administration's argument that the appeal was out of time, but recommended unanimously that the appeal be rejected on the merits. In a letter dated 20 February 1998 the President rejected the appeal. That is the decision impugned.

12. The Organisation argues that the complaint is irreceivable because the complainant did not file his internal appeal in time. It claims the decision of 1 February 1996 was definitive. The letter of 22 May 1996 merely repeated the same decision. The Appeals Committee took the view that the letter of 1 February did not appear to contain a "decision" since it included the request: "please enclose the relevant proof".

13. The Tribunal believes that letter to be somewhat ambiguous. The complainant may therefore rely on the later letter of 22 May 1996 as containing the final decision which unequivocally refused his request.

14. Article 81(1) of the Service Regulations refers to removal expenses and provides that:

> "A permanent employee shall be entitled to reimbursement of expenses actually incurred for the removal of household and personal effects …
> (c) on leaving the service …"

15. The complainant argues that the Organisation's interpretation of Article 81(1) is "over legalistic". He claims that the letter dated 22 August 1997 stated that the outstanding balance would be refunded when it could be

shown that the transport company accepted that the amount was in "compensation for damages or out-of-pocket expenses" he had incurred. He says that he was told that if the transport company did not take legal redress within three years, as was the case, this represented tacit acceptance. He appears to allege involvement on the part of the Organisation in Cramer's letter of 5 February 1996 which threatened legal proceedings. In his view, the fact that these threats were not put into action provides the Organisation with sufficient proof of tacit acceptance of his action. Moreover he states that the Organisation acted in bad faith.

16. The Organisation contends that the complainant has failed to furnish any evidence to prove he paid 2,314 marks or that the removal firm agreed to treat this balance as compensation. On the contrary, they threatened to initiate legal proceedings in the event of non-payment. It believes that the dispute concerning the outstanding sum must be settled between the complainant and the removal firm prior to any reimbursement by the Organisation. The firm did not unconditionally and irrevocably assume full liability as alleged by the complainant but merely stated that it assumed full responsibility for any damage caused.

17. The Tribunal is satisfied that the Organisation correctly applied Article 81(1), which provides only for the reimbursement of "expenses actually incurred". The complainant has neither proved that he has paid the outstanding sum of 2,314 marks to the removal firm, nor provided evidence of the firm's agreement to treat this amount as compensation.

18. There is no proof of bad faith on the part of the Organisation. Also the complainant has failed to produce any evidence in support of the alleged promise that the EPO would pay if legal proceedings were not initiated within a certain time by Cramer, which is contrary to what was stated in the correspondence.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-SEVENTH SESSION

***In re* Müller-Engelmann (No. 2)** **Judgment 1847**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 23 December 1997, and corrected on 2 February 1998, the EPO's reply of 23 April, the complainant's rejoinder of 29 July and the Organisation's surrejoinder of 9 September 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out in Judgment 1829 on Mrs Müller-Engelmann's first complaint. At the material time she was employed by the European Patent Office, secretariat of the EPO, in Munich, as an examiner at grade A3.

On 1 August 1997 the complainant submitted a claim for reimbursement of medical expenses, totalling 4,226.75 German marks, to the insurance brokers Van Breda, who are responsible for the day-to-day handling of the collective insurance contract concluded by the EPO.

According to the version then in force of Article 23 of the contract: "Reimbursement of expenses incurred shall be effected by means of a cheque sent to the insured staff member ... within 15 days ...".

The complainant wrote to the President of the Office on 25 August 1997 appealing against the non-reimbursement of the medical expenses claimed and calling upon the EPO to instruct Van Breda to pay the "amount receivable" within ten days with 14 per cent interest, or otherwise consider her letter as an internal appeal.

On 8 September the complainant received payment of 3,116.49 marks. Van Breda did not reimburse all her medical costs. It excluded from settlement a bill dated 12 December 1996 for 58.28 marks for medical services from Runow and Weber, physicians. Van Breda's settlement statement of 28 August 1997 carried the mention "excluded from the policy" against the reference number denoting that bill.

The Director of Personnel Development acknowledged receipt of her internal appeal 71/97 on 31 October 1997, and told her that as the doctors involved had been asked to provide further information, no final decision had yet been taken.

The complainant submits that in the absence of a reply from the President to her appeal of 25 August she filed her complaint with the Tribunal.

B. The complainant holds that her claim is receivable. The President received her appeal on 25 August, but took no action within the period of sixty days under Article VII(3) of the Tribunal's Statute.

She pleads that failure to reimburse her medical expenses is unlawful. The amount refunded on 8 September did not "cover all costs subject to reimbursement". Van Breda gave no reasons for its refusal to meet the bill for 58.28 marks from Runow and Weber. The bill clearly stated the diagnosis, listed the individual services with the relevant dates and gave their "*GOÄ*-number" (the official billing chart of the medical profession). She claims that the medical services listed on their bill are covered by her insurance under Articles 16 and 20 a) and b) 1.1 of the collective insurance contract.

As she submitted her claim for reimbursement on 1 August it could be assumed that Van Breda received it by 4 August. To comply with Article 23 of the collective contract, reimbursement by cheque – or bank transfer in this case – should have been ordered within fifteen days, that is by 19 August and payment of the amount of 3,116.49 marks reimbursed to her, plus the outstanding 58.28 marks, should have reached her account by 26 August. It did not: she therefore claims interest for late payment.

The complainant asks the Tribunal to order the EPO: (1) to reimburse her for the bill for 58.28 marks, dated 12 December 1996, with interest of 14 per cent per annum from 27 August 1997; (2) to pay her interest of 14 per cent on the sum of 3,116.49 marks over a period of twelve days from 27 August to 8 September 1997; (3) to compensate her for translation and copying costs; and (4) to pay her legal costs.

C. The EPO asks the Tribunal for the joinder of this complaint with a third complaint that she has filed as in both she asks for reimbursement of medical bills refused by Van Breda and interest for late payment.

The Organisation contends that the complaint is irreceivable under Article VII(1) of the Statute of the Tribunal, as the complainant has not exhausted the internal means of redress. Her appeal lodged on 25 August 1997 has been considered neither by the Appeals Committee nor by the Invalidity Committee whose proceedings would replace those of the Appeals Committee.

In her present complaint the complainant's main request is regarding reimbursement of the bill for 58.28 marks, together with interest for late payment on that sum from 27 August, and on the sum of 3,116.49 marks for the twelve-day period from 27 August to 8 September: whereas her internal appeal 71/97 constituted solely a request for interest for late payment.

This complaint is also devoid of any cause of action, as Van Breda has now agreed to settle the claim for 58.28 marks, owing to a mistake relating to that invoice on the settlement statement of 28 August. According to that statement the type of costs incurred were excluded from the policy, but Van Breda has since acknowledged that the real reason preventing its medical adviser from allowing reimbursement was that he needed additional information to check "the legitimacy of the amounts invoiced".

As for interest for late payment, the complaint is also devoid of substance. Under Article 23 of the collective contract the period for payment is that within which the bank transfer – which replaces payment by cheque – is made, and it is not determined by the date the recipient's account is credited. Van Breda had, therefore, agreed to pay the complainant interest for late payment at a rate of 10 per cent for "nine" days on the sum of 3,116.49 marks, totalling 7.68 marks. Those nine days ran from 19 August to the date of Van Breda's settlement statement of 28 August 1997.

Her complaint being deemed irreceivable the defendant refutes the complainant's claim for translation and legal costs.

D. In her rejoinder the complainant observes that although the EPO recognised her claim for 58.28 marks it had not yet paid her the sum. She therefore maintains her claim for that amount and for interest thereon.

While she acknowledges receiving 7.68 marks through Van Breda as payment of 10 per cent interest on 3,116.49 marks over "ten" days, she claims the balance as she had asked for 14 per cent per annum over twelve days.

The complainant argues that under Article 90(1) of the Service Regulations the Invalidity Committee would not have been the competent body to deal with her case, as there was no medical dispute. The correct internal course of action lay through the Appeals Committee. The acknowledgement of receipt of her appeal by the Director of Personnel Development can in no way purport to be a ruling of the President within the meaning of Article 109 of the Service Regulations and the case has not gone to the Appeals Committee.

It is to be noted that, according to Dr Runow, Van Breda made no effort to obtain the additional information needed about the invoice from him. The diagnosis was evident from the bill submitted. Inasmuch as the invoice related to medical treatment she was entitled to reimbursement under Article 16 of the collective contract.

She presses her other claims to costs.

E. The Organisation reiterates in its surrejoinder that her internal appeal only concerned the request for interest for late payment and was submitted on 25 August 1997, that is before she received Van Breda's settlement statement of 28 August 1997 showing that it was reimbursing some of the amounts in question. A final decision has not yet been taken.

The standard procedure for medical disputes could not be followed as Van Breda's medical adviser has been unable to obtain the information he needs and which he has the right to request. The Organisation repeats that the Invalidity Committee is competent to decide on the matter.

The complainant alone was responsible for delaying reimbursement to her of the invoice for 58.28 marks. Van Breda agreed to reimburse the invoice as a "conciliatory gesture" and asked her on 30 April 1998 to return the original bill to them, as expenses could only be reimbursed against the original invoice. Necessary information still had not been provided and it was therefore "normal that the reimbursement should not result in the payment of late-payment interest".

CONSIDERATIONS

1. There are only two issues involved in this case; firstly, the complainant's claim to medical insurance reimbursement of an invoice for the amount of 58.28 German marks and secondly, the complainant's claim to interest for late payment on 3,116.49 marks.

2. As will appear, the defendant has made a binding offer to settle both claims but the complainant has refused this offer, at least impliedly.

3. The complainant is an employee of the European Patent Organisation. At the material time Article 23 of the collective insurance contract covering such employees provided that reimbursement of medical expenses "shall be effected by means of a cheque sent to the insured staff member ... within 15 days following the date of receipt by the intermediary broker [Van Breda] of the claim".

4. The complainant submitted a claim for reimbursement of medical bills to a total of 4,226.75 marks on 1 August 1997. It can be assumed that the claim was received by Van Breda on 4 August 1997. On 25 August 1997, the complainant filed an internal appeal seeking payment of the

amounts claimed together with interest for late payment. She had neither heard from Van Breda, nor had she taken any other steps or made any inquiries. On 28 August 1997, Van Breda responded to the complainant's claim of 1 August; some of the expenses claimed were rejected and are not apparently now at issue; the invoice for 58.28 marks was also rejected without giving a valid reason; a balance of 3,116.49 marks was accepted and the same day payment of that amount was sent by bank transfer to the complainant's account. However the sum was only credited to the complainant's bank account on 8 September 1997.

5. It appears that the complainant's internal appeal was not processed and in a letter of 31 October 1997 the defendant indicates that it believes the matter is still under investigation by Van Breda and is pending.

6. On 23 December 1997 the present complaint was filed with the Tribunal, seeking, as already indicated, reimbursement in respect of the unpaid claim for 58.28 marks and interest for payment twelve days late at 14 per cent per annum on 3,116.49 marks.

7. On 8 April 1998, prior to the filing of its reply herein, the defendant wrote to Van Breda directing it to pay the sum of 58.28 marks since sufficient reason for refusing payment had not been provided; in the same letter, the defendant also directed Van Breda to pay interest for late payment on 3,116.49 marks at 10 per cent for a period of nine days. On 30 April 1998, Van Breda complied with these directions and wrote to the complainant asking her to send them the original invoice of 58.28 marks as the sole pre-condition to the reimbursement thereof; it also credited the complainant with late payment interest on the basis indicated by the defendant. The complainant has apparently not complied with Van Breda's request to submit the original invoice of 58.28 marks. She also contests the calculation of the interest for late payment and has gone ahead with her complaint claiming, in addition to the sums mentioned, full reimbursement of her legal costs and the translation costs.

8. The defendant contests the receivability of the complaint. In light of the view that the Tribunal takes of the merits of this claim, it will not deal with that question.

9. The Tribunal holds that the claim for 58.28 marks has been the subject of a valid, sufficient and binding offer of settlement. The request by Van Breda for the submission of the original invoice is an entirely reasonable condition and, if the amount has not yet been paid, the complainant has only herself to blame.

10. The Tribunal further holds that the payment of interest for late payment calculated on the basis of 10 per cent per annum for a period of nine days fully complies with the defendant's obligations. The fifteen-day period provided by the collective insurance contract expired on 19 August 1997. Van Breda's obligation was to "send" the reimbursement to the complainant within that period; it is not responsible for delays due to postal or banking services. The reimbursement was in fact sent on 28 August 1997: the payment was thus late by only nine days. The Tribunal holds that the interest rate of 10 per cent is more than adequate.

11. The question of both legal and translation costs is entirely within the discretion of the Tribunal. Where a valid, sufficient and binding offer to settle is made by a defendant in the course of proceedings, and the complainant continues with the complaint in the face of such an offer, the Tribunal may well deny costs. The Tribunal also notes that in the present case the complainant filed her internal appeal almost immediately and without apparently requesting information from the defendant or from Van Breda as to the progress of her claim: she appears to be more interested in litigation than in dealing in good faith with her employer. Parties and their legal advisers should be encouraged to settle their claims and dissuaded from time-wasting disputation. There will be no order for costs.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-SEVENTH SESSION

***In re* Müller-Engelmann (No. 3)**

Judgment 1848

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 10 February 1998, the EPO's reply of 23 April, the complainant's rejoinder of 28 July and the Organisation's surrejoinder of 9 September 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out in Judgment 1847 also delivered this day, on Mrs Müller-Engelmann's second complaint. At the material time she was employed by the European Patent Office, secretariat of the EPO, as an examiner at grade A3 in Munich.

On 22 August 1997 the complainant submitted a claim for reimbursement of medical expenses totalling 3,881.12 German marks to the insurance brokers, Van Breda, who are responsible for the day-to-day handling of the collective insurance contract concluded by the EPO.

By a letter of 12 September, the complainant appealed to the President of the Office against the non-reimbursement of those medical expenses within the fifteen-day time span provided for in Article 23 of the collective insurance contract. She asked for reimbursement by Van Breda within ten days or for the Office to take legal action against them to collect the amount receivable plus 14 per cent interest for the delay.

Van Breda refunded 1,090.50 marks, but refused reimbursement of three bills: one dated 21 January 1997 from Runow and Weber, physicians, for 1,190.72 marks; and two bills from a laboratory, Labo Tech, one of 16 December 1996 for 250.59 marks and the other dated 6 January 1997 for 317.63 marks. A note on Van Breda's settlement statement dated 12 September 1997 informed the complainant that for those three they were "waiting for additional information which [they had] required of [her] physician/hospital".

In a letter of 17 September Van Breda informed the complainant that they were "thoroughly looking into" the three bills for which payment was withheld and would let her know the outcome. On 28 September the complainant sent a revised appeal to the President, claiming reimbursement by Van Breda against the three invoices. The Director of Personnel Development acknowledged receipt of her internal appeal 87/97 on 31 October. The complainant says that having received no answer from the President she filed her complaint with the Tribunal.

B. The complainant pleads that her complaint is receivable. Her internal appeal dated 12 September was received by the defendant on 16 September 1997. As the President took no action within sixty days her complaint to the Tribunal is receivable under Article VII(3) of its Statute and Article 109(2) of the EPO Service Regulations.

The complainant pleads that failure to reimburse her expenses is unlawful: the medical services listed on the bills are subject to reimbursement under Article 16 and 20 a) and b) 1.1 of the collective insurance contract.

The bill from Runow and Weber stated a clear diagnosis. It also listed the individual medical services with the relevant date, and their "*GOÄ*-number" (the official billing chart of the medical profession). Van Breda's assertion that it was waiting for further information from the physicians was no reason to leave the claim unsettled. Since the defendant did not tell her what it considered was wrong with the three bills she could not seek clarification herself through her physicians. Van Breda's affirmation in its letter of 17 September that it was "thoroughly looking into" the bills was not enough: it gave no reasons for refusing reimbursement.

Van Breda would, she assumes, have received her claim of 22 August by 25 August. According to Article 23 of the collective insurance contract Van Breda should give instructions for reimbursement within 15 days, and so the bank transfer should have been executed on 9 September at the latest. Allowing a further week, the complainant's account should have been credited by 16 September: she therefore claims interest for late payment as from 17 September.

First, she seeks the reimbursement by the defendant of the three medical bills: one from Runow and Weber for 1,190.72 marks; and two from Labo Tech for 250.59 and 317.63 marks; and claims interest of 14 per cent per annum from 17 September 1997 on all three. Secondly, she claims compensation for translation and copying costs. Lastly, she asks that the defendant "be liable to pay the actually incurred amount of the Complainant's related non-legal and legal expenses, should such expenses occur".

C. The Organisation in its reply requests the joinder of the complainant's second complaint with this, her third. In both she asks for the reimbursement of medical invoices which Van Breda was unable to refund because its medical adviser did not have all the necessary information relating to the claims.

Her third complaint, it asserts, is irreceivable. In her internal appeal, 87/97, filed on 12 September she only sought interest for late payment against all the invoices, totalling 3,881.12 marks, which she submitted for reimbursement on 22 August. The internal means of redress have not been exhausted, as neither the internal Appeals Committee, nor the Invalidity Committee, which would act as a substitute, have yet met to hear appeal 87/97. The Organisation points out that the Director of Personnel Development acknowledged receipt of her internal appeal on 31 October 1997.

It claims that her complaint is partly unfounded. Citing Judgment 1288, *in re* Fessel, it affirms that insurers are entitled to ask for information to determine if treatment was appropriate and the onus can be on the employee help provide it. Van Breda was entitled to make reimbursement of the invoices dependent on its medical adviser receiving the information required from Runow and Weber and Labo Tech.

Van Breda had written to Labo Tech on 1 October 1997 asking for "a copy of the laboratory results which confirm the ascertained diagnosis", to enable their medical adviser to reach a decision about the reimbursement of the amounts invoiced. They sent a similar letter to Runow and Weber, followed by a reminder to them and to Labo Tech on 24 March 1998. Runow and Weber responded inasmuch as they returned the reminder with a hand-written note on it saying: "We don't have the allowance from our patient to send laboratory results". Labo-Tech has still not responded to requests for information. The complainant is aware of those requests, but it is assumed she will be opposed to the laboratory providing required information too.

On 13 March Van Breda had written to the complainant telling her that their medical adviser needed "a medical report as well as the laboratory results proving the ascertained diagnosis", and told her that if they received no reply they would return her invoices to her. The defendant argues that Van Breda is meanwhile justified in not reimbursing the invoices in question.

Subsidiarily the complaint is partly devoid of substance. By a letter of 8 April 1998 the Directorate of Staff Policy requested Van Breda to pay the complainant interest for three days' late payment - from 9 to 12 September - at 10 per cent on the 1,090.50 marks reimbursed following her claim of 22 August 1997. Under Article 23 of the collective insurance contract instructions should be given for payment within fifteen days: payment does not have to be credited to the payee's account within that time.

The EPO rejects her request for reimbursement of translation costs and legal fees.

D. The complainant in her rejoinder enlarges on her pleas.

She takes the view that the appropriate body to hear her case was the Appeals Committee, rather than the Invalidity Committee. No examination was performed by the EPO's medical officer, and there was no medical dispute between that officer, the complainant or her physician. The Organisation took no steps to convene an Invalidity Committee either.

Her internal appeal did not only relate to interest for late payment, but also to the medical bills at issue. Acknowledgement of receipt of her appeal did not constitute a ruling on the part of the President within the meaning of Article 109 of the Service Regulations.

The complainant does not dispute that Van Breda is entitled to information "for the purpose of examining its obligation to render payment", and has always been prepared to cooperate in obtaining medical findings and laboratory results required to that end. However, the Organisation has no more asked for her cooperation in the procuring of findings, than it has asked her to release her physicians from "their obligation to preserve secrecy".

As the nature of her ailment was identified on the invoices it was clear the services were medical and reimbursement was justified. She claims the EPO is impugning the "diagnoses per se", and refuses therefore to reimburse costs connected with them. It was making the reimbursement of the costs contingent on its acceptance of the diagnosis.

Van Breda, she says, is "obliged" to reimburse the bills because of irregularities she points to. Contrary to what the defendant affirms, Labo Tech did not receive a letter from Van Breda dated 1 October 1997 asking for a copy of the laboratory results; it only received the reminder of 24 March 1998, after the filing of the present complaint. The alleged letter to Runow and Weber of 1 October did not relate to the bill at issue of 21 January. It was only the "reminder" of 24 March 1998 that mentioned it and made it clear that information was needed.

She further asserts that Van Breda "creates the impression that it acts arbitrarily" and was unclear about what it needed to know to come to a decision on the refund. It paid her other Labo Tech invoices without query yet it refused invoices connected in any way with intoxication arising from environmental problems in the European Patent Office in Munich.

The 0.90 marks paid by Van Breda as interest at 10 per cent for three days' interest for late payment on the sum of 1090.50 does not relate to the claims at issue. She claims interest that has accrued since 17 September 1997 at the rate of 14 per cent.

E. In its surrejoinder the Organisation maintains its arguments.

The complainant's internal appeal was dated 12 September 1997, and Van Breda's settlement statement showing that some invoices had not been reimbursed was sent to her the same day. A final decision has not been taken with regard to the contested invoices and so the internal appeal procedure has not been able to follow its normal course.

The Invalidity Committee is the competent body to decide on this case by virtue of the collective insurance contract concluded by the EPO which indicates that Van Breda is responsible for the day-to-day administration of the contract. Van Breda and its medical officer act in lieu of the Office. The Committee can only intervene if a definite refusal to supply information leads to a medical dispute.

Given that "poisoning due to environmental factors is such a controversial issue", Van Breda's medical adviser is justified in requesting from practitioners and laboratories further information "proving the ascertained diagnosis" so that he can decide if the diagnosis is justified. In this case he has not yet received the information he needs.

Contrary to what the complainant affirms, Van Breda's medical adviser did contact the laboratory and Runow and Weber for the information required before 24 March 1998. Labo Tech "admits to having received" - "albeit belatedly" a copy of the letter dated 1 October 1997 from Van Breda and says that it was awaiting instructions from the complainant. Runow and Weber also knew of the medical adviser's requests for information as is clear from the wording of the note written on the reminder letter of 24 March that they returned to Van Breda.

CONSIDERATIONS

1. While the complainant appears to believe this case to be about her right to reimbursement of certain alleged medical expenses, the defendant seems to think that it is a medical dispute which should have come before the Invalidity Committee. In reality the case turns upon the application of well-established and uncontroversial principles of law.

2. On 22 August 1997, the complainant, an employee of the European Patent Office, filed a claim with Van Breda for reimbursement of medical expenses totalling 3,881.12 German marks. Article 23 of the collective insurance contract requires Van Breda to send settlement of such claims within 15 days of receipt. The complainant, on 16 September 1997, lodged an internal appeal dated 12 September in which she sought reimbursement of her expenses together with interest for late payment.

3. On 12 September 1997, Van Breda sent out a settlement note reimbursing the complainant the sum of 1,090.50 marks, an amount which did not cover all the invoices submitted. Van Breda refused reimbursement of the following:

(a) an invoice from Drs Runow and Weber dated 21 January 1997 for 1,190.72 marks. This covers consultation and other services, with the diagnosis that the complainant was suffering from "exposure to solvents and detoxification problems of the liver";

(b) an invoice from Labo Tech dated 16 December 1996, for 250.59 marks, for a "Redox" examination; and

(c) an invoice from Labo Tech dated 6 January 1997, for 317.63 marks, covering a "personal vitalising substance mix".

4. Both in the settlement note and in a letter to the complainant dated 17 September 1997, Van Breda indicated it required additional information on the exact nature of the medical services which had been performed.

5. The complainant's bank account was credited with the amount of 1,090.50 marks on 23 September 1997.

6. Van Breda's inquiries with the laboratory and/or the complainant's medical advisers remain unclear; they claim to have written to the laboratory on 1 October 1997 requesting a copy of the results which confirmed the diagnosis, but the laboratory first denied receiving such letter.

7. On 28 September 1997 the complainant amended her internal appeal taking account of the payment received from Van Breda. She asserts two claims:

(a) Interest for late payment on 1,090.50 marks at the rate of 14 per cent per annum;

(b) Payment of the three above-noted invoices as well as interest at 14 per cent per annum for late payment.

In her internal appeal as amended the complainant questions unequivocally the right of Van Breda to contact her physicians directly to seek information.

8. The complainant's internal appeal does not appear to have proceeded although the record does not reveal what, if any, steps she took to press the matter forward. The present complaint was filed with the Tribunal on 10 February 1998.

9. On 8 April 1998 Van Breda paid the complainant three days' interest at 10 per cent per annum on 1,090.50 marks.

10. While it is not by any means clear that the complainant has effectively exhausted her internal remedies so as to render the present complaint receivable, the Tribunal prefers to deal with this matter on the merits.

11. The claim for late payment interest has clearly been settled. It is accepted by all parties that Van Breda received the complainant's claim on 25 August and that the reimbursement should have been sent to her by 9 September. It was in fact sent on 12 September - three days late. She has now been paid three days interest at 10 per cent and that is more than adequate. Her insistence on continuing with her claim is unfounded.

12. As to the claim regarding the disputed invoices, the law is clear that Van Breda, as representing the insurer, is entitled to any information which identifies the nature of the alleged illness and allows it to determine whether the prescribed treatment is appropriate and necessary (see *in re* Fessel, Judgment 1288 under 7). Of course the complainant is entitled to require that such information only be made available to Van Breda's medical adviser and be treated by the latter in confidence but she is not entitled to withhold from them any right of access whatsoever to the required medical

information. Her unwillingness to allow such access goes against her duty to deal in good faith with her insurers. Moreover, there is no merit whatever to the complainant's argument that because the costs at issue here were incurred in the establishment of a diagnosis they must necessarily be allowed. That argument simply calls into question the existence of the alleged illness and the correctness of its diagnosis.

13. The complaint being without foundation, the question of costs does not arise.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

***In re* Gera**

Judgment 1849

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Om Parkash Gera against the World Health Organization (WHO) on 13 April 1998 and corrected on 28 April the WHO's reply of 6 August, the complainant's rejoinder of 24 August and the Organization's surrejoinder of 26 November 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian national who was born in 1938, joined the staff of the WHO on 26 March 1980 in the Regional Office for South-East Asia (SEARO) in New Delhi as a clerk/typist. When he retired on 31 March 1998, he had reached grade ND.5.

On 26 July 1992, the complainant was seconded to the United Nations Interim Force in Lebanon (UNIFIL). His contract, which was initially for a period of one year, was extended on several occasions and his assignment came to an end on 22 July 1996.

By a fax letter of 10 May 1993, SEARO's Budget and Finance Officer informed the chief of the Field Personnel Section of UNIFIL in New York of the amount of the salary to be paid to the complainant. By a letter of 22 August 1994 the Finance Section of UNIFIL informed the complainant that it had verified and approved the amount in question for the period from 25 July 1992 to 30 June 1994. Throughout the complainant's secondment his remuneration was advanced by the WHO and then reimbursed to the WHO by the United Nations.

At the end of his secondment the complainant requested the payment of the allowances owed to him amounting to a total of 4,857.91 United States dollars. By a memorandum of 30 September 1996, the Administration of SEARO informed him that, due to a miscalculation of his post adjustment, his salary had been overpaid during his assignment. The overpayment, calculated to be $11,912.11, had to be reimbursed to the WHO. The Administration informed him that the amount of $4,857.91 referred to above would be used for the reimbursement of part of the overpayment and left to the complainant the choice of methods for the settlement of the remaining part. Negotiations did not produce a solution. By a memorandum of 4 February 1997, the Administration confirmed that his allowances would be used for the partial reimbursement of the overpayment and added that, as from February 1997, $100 would be deducted from his net salary every month until the day of his retirement. The balance ($5,554.20) would have to be paid at the end of his contract.

On 10 March 1997, the complainant filed two requests. In the first, addressed to the Regional Director of SEARO, he asked that the overpayment not be recovered. In the second, addressed to the Budget and Finance Officer, he reiterated this request and explained that Staff Rule 380.5 did not authorise deductions from from salaries for the reimbursement of an overpayment, which did not constitute indebtedness to the Organization. The Administration replied by a memorandum dated 26 March that its position remained unchanged. Having considered the case, the regional Board of Appeal issued its report on 22 August. It considered that Staff Rule 380.5.2, which allows for a deduction from salary" for indebtedness to the Organization", had been wrongly applied and recommended that the Administration should strictly apply the established rules and procedures for the recovery of an overpayment.

By a letter of 1 October 1997, the Regional Director considered that Staff Rule 380.5.2 had been correctly applied and that an overpayment represented a debt to the WHO. He also affirmed that the deduction of $100 a month was "just and equitable" for both parties, but stated that he would not require the repayment of the remaining amount of the overpayment. The complainant lodged an appeal against this decision with the headquarters Board of Appeal. This latter Board issued its report on 23 February 1998, in which it confirmed the principle of the reimbursement of an overpayment. However, it recognised that in the present case full repayment would cause undue hardship to the appellant and recommended that the decision of the Regional Director of 1 October 1997 be maintained. In a letter of 27 March 1998, which is the impugned decision, the Director-General accepted this recommendation.

B. The complainant denies being overpaid as the emoluments paid to him were certified as correct and accepted by both UNIFIL and the WHO. Furthermore, the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances (hereinafter called Inter-Organization Agreement) provides that the seconded staff member shall be subject to the Staff Regulations and Rules of the receiving organisation. He says that without the explicit authorisation of the United Nations, the WHO had no authority to effect recovery. Having been fully reimbursed by the United Nations, the WHO had no grounds for requesting reimbursement from him.

The complainant contends that the monthly deductions decided upon by the Administration under Staff Rule 380.5.2 are illegal. He submits that the overpayment cannot be considered a debt owed to the WHO, that this practice is contrary to the principles laid down in Judgment 53 (*in re* Wakley) of the Tribunal and that no rule allowed the Administration to withhold the allowances to which he was entitled or the $122.66 which it owed to him in respect of his within-grade increase.

The complainant contends that by withholding the allowances due to him without consulting the Director-General the WHO did not respect Financial Rule 106.4.

Referring to the case law of the Tribunal, the complainant submits that he received his pay and allowances in good faith, that the negligence based on the "miscalculation" was entirely on the part of the Administrations of the WHO and the United Nations and that the reimbursement of this overpayment would cause him acute hardship, for which reasons he says the WHO should waive the reimbursement of the overpayment.

Finally, he contends that he has already spent the money and that he cannot be requested to reimburse it.

The complainant asks the Tribunal to quash the Regional Director's decision of 1 October 1997 and the Director-General's decision of 27 March 1998; to order that the deductions of $100 a month made between February 1997 and March 1998 be refunded to him; to order the Administration to pay him the sums of $4,857.91 and $122.66 withheld from him with interest at 18 per cent per annum from the date on which such amounts became payable up to the date of payment; and to order the WHO to pay $50,000 for moral injury and $2,500 in costs.

C. In its reply, the Organization recognises that it is jointly responsible with the United Nations for a miscalculation, but submits that an overpayment constitutes a debt which must be repaid to the Organization.

Citing the Inter-Organization Agreement, it contends that a seconded staff member, even if he is subject to the staff regulations and rules of the receiving organisation, still remains a member of the staff of the releasing organisation. In the material case, the WHO was responsible for the payment of the complainant's salary and other emoluments. It is therefore entitled to reclaim the reimbursement of the overpayment. It adds that it had a "fiduciary duty" vis-à-vis the United Nations in that it remained responsible for the accuracy of the charges born by the latter. Since the discovery of the overpayment was made after the complainant had returned to SEARO, only the WHO could undertake recovery.

Basing itself on the case law of the Tribunal, the WHO submits that its decision to claim the reimbursement of the overpayment is within its discretionary power. Since the complainant had a debt towards the Organization it correctly relied on Staff Rule 380.5.2 and claimed reimbursement of it. The reference made by the complainant to Judgment 53 is not pertinent, as that Judgment was pronounced in 1961 and Rule 380.5.2 has been introduced since. Based on the reports of the two Boards of Appeal, it submits that Financial Rule 106.4 is not applicable to the case. It justifies its decision to withhold the complainant's allowances by the fact that he had refused during the negotiations to reimburse the overpayment.

D. In his rejoinder, the complainant contends that the WHO has no discretionary authority in this matter. He emphasises the contradictory stand adopted by the WHO, which first says it has to recover payment from him because of its "fiduciary duty" towards the United Nations and then says it has the discretionary power to waive recovery of part of the sum.

He submits that the WHO "ignored" the conclusions of the Boards of Appeal. He rejects its interpretation of the Inter-Organization Agreement. He says that the United Nations had to check all the payments made by the WHO on its behalf and, conversely, endorse any reimbursement. He considers that the WHO took the initiative of making recoveries in order to hide its carelessness from the United Nations.

He points out that the WHO is silent on the issue of withholding the $122.66.

E. In its surrejoinder, the WHO observes that the Boards of Appeal both recognised that the complainant had to reimburse the overpayment and that it had full authority to recover the amounts in question. It denies that it contradicted itself and says that its fiduciary duty vis-à-vis the United Nations was distinct from its discretionary authority vis-à-vis its staff members. It contests the receivability of the claim concerning the withholding of the $122.66 on the grounds that all the internal means of resisting the decision were not exhausted.

CONSIDERATIONS

1. The complainant was a staff member of the WHO's Regional Office for South-East Asia (SEARO) from March 1980 until his retirement on reaching the age of 60 in March 1998.

2. He was seconded to the United Nations Interim Force in Lebanon (UNIFIL) from July 1992 to July 1996. His salary and allowances (post adjustment, mobility and hardship) were calculated, authorised and

paid by SEARO's Budget and Finance Officer, verified later by the United Nations and reimbursed by the latter to the WHO.

3. However it transpires that, according to the Organization the complainant's post adjustment had been wrongly calculated by the Budget and Finance Officer which resulted in an overpayment of 11,912.11 United States dollars over the period of four years. This was not discovered until the complainant had returned to work at SEARO.

4. He was invited to discuss a repayment plan and when negotiations proved unsuccessful the Organization notified the complainant on 4 February 1997 of its intention to retain an amount due to him of $4,857.91 for assignment grant and travel expenses to offset part of the debt and to deduct $100 per month from his net salary until he retired on 31 March 1998 when he would pay the balance of $5,654.20 as a lump sum.

5. When the Regional Director failed to respond to his request that there should be no recovery of monies, the complainant appealed to the regional Board of Appeal which agreed that the overpayment should be recovered. On 22 August 1997 it recommended that in recovering the "overpayment" the Administration should follow established rules and procedures and that the claim for moral and material injury and legal expenses had no basis. The Regional Director proposed on 1 October 1997 that the reimbursement arrangement should continue until retirement but the complainant would not be required to repay the remaining amount of the overpayment.

6. The complainant appealed to the headquarters Board of Appeal which agreed in its report of 23 February 1998, with the exception of one member, that as a matter of principle an overpayment should always be reimbursed. The dissenting member held the view that each case should be considered on its merits. They agreed that the decision to withhold the sum of $4,857.91 was arbitrary and that sum should not have been retained. The Board considered that paying $100 per month until retirement was reasonable and recommended that the solution proposed by the Regional Director of SEARO be maintained and rejected his other claims for redress.

The Director-General accepted those recommendations in his decision of 27 March 1998. That is the decision impugned.

7. The relief claimed by the complainant is for the quashing of the decision of 27 March 1998, the return of the deductions from salary, the payment of $4,857.91 and $122.66 withheld by the Administration with interest at 18 per cent per annum, $50,000 for moral injury and $2,500 towards legal costs.

8. The complainant argues that there was abuse of authority and the decision to withhold payments was unauthorised in that, as stated in Annex A of WHO Manual section II.5, when he was on secondment he was subject to the staff regulations and rules of the receiving organisation. Any payment has to be reckoned and certified by the United Nations in New York. Therefore recovery of an overpayment has to be governed by the regulations and rules of the United Nations not the WHO. The statement was sent month by month to the Chief of the Field Personnel Section of the United Nations without any objection being raised and was accepted by that Organization. The complainant received the payments in good faith. SEARO was making payments on behalf of the United Nations and had no authority without express sanction from the latter to recover any overpayment. The entire amount was reimbursed to SEARO by the United Nations and SEARO has no *locus standi*, especially as the amounts were certified correct by the United Nations.

9. The complainant further argues that there was a mistake of law in that the deductions were ordered under Staff Rule 380.5 which states that salaries are subject to deductions only in certain cases, one of which, under 380.5.2, is: "for indebtedness to the Organization" and payment by mistake does not create a debt.

10. The complainant also alleges a procedural flaw in that before withholding the sum of $4,857.91 SEARO's Budget and Finance Officer failed to refer the matter to the Director-General as stipulated in Financial Rule 106.4:

> "Should Budget and Finance feel there is any reason why payment of any claim should be withheld, such claims shall be referred to the Director-General."

An assignment grant comprises a daily subsistence allowance and a lump-sum payment to facilitate setting up house and the costs of relocating. It is by its very nature an ad hoc allowance and non-payment is bound to cause hardship. The reassignment travel claim is for reimbursement of expenses already incurred. There is no rule which allows the withholding of an assignment grant or reassignment travel claim.

11. An additional amount of $122.66, payable to the complainant for arrears of within-grade salary increment was withheld without any authority.

12. The complainant alleges that the Organization failed to take essential facts into account. There was agreement that he received the payments in good faith and the overpayments were due to the negligence of the Administration in both the WHO and the United Nations. He says his net monthly salary during his secondment in June 1996 was $4,977.55. On return to SEARO in August 1996 it was $633.50. After deduction of $100 in February 1997 it was $533.50. It should have been clear that acute hardship would be caused and that all factors favoured complete waiver.

13. The complainant says he cannot be required to pay if he is no longer in possession of the sum overpaid. He received pay and allowances in good faith over four years. He spent the money available to him on his household and on the marriages of his two sons and two daughters during his secondment.

14. The Organization argues that a staff member is entitled only to emoluments and benefits payable under the rules. The receipt of any sums not due constitutes unjust enrichment and a debt on the part of the recipient. The general principle of law whereby the payer is entitled to recover from the payee sums paid erroneously is applicable to the present case: see Judgments 53 (*in re* Wakley), 497 (*in re* Anderson) and 1195 (*in re* Najia Zayed).

15. The WHO maintains that it has authority to recover the debt. The complainant remained a staff member and SEARO remained responsible for the regularity of the payments. Therefore SEARO was not divested of the authority to recover the overpayments. The Organization continued to have a *locus standi* since it has a "fiduciary duty" to the United Nations and is responsible for the accuracy of the charges invoiced to it and consequently the reimbursement of money charged in error.

16. The Organization claims that the decision of the Director-General was a reasonable exercise of discretionary authority which is subject to limited review by the Tribunal. Judgment 1111 (*in re* Durand), which is a case involving overpayment, sets out that the factors to be taken into account: the staff member's good or bad faith; the sort of mistake made; the organisation's or the staff member's negligence; and the inconvenience to which the staff member would be put because of the organisation's own oversight. The Organization claims it fully respected the applicable rules in deducting $100 each month and offsetting the complainant's credit for $4,857.91 for the assignment grant and reassignment travel. It claims that the salary deduction was made under Staff Rule 380.5.2 for indebtedness to the Organization and it deducted a reasonable amount.

17. Concerning the complainant's credit of $4,857.91, the WHO submits that Financial Rule 106.4 does not apply here. That rule is relevant only to cases where the Budget and Finance Division is not going to settle a claim because of some irregularity. There was no irregularity in the complainant's claim here. It had been correctly approved and the corresponding amount appropriated and held to his credit. The Organization claims that the Administration was justified in using the complainant's credit to offset part of the overpayment: it acted reasonably in so doing and in making a modest deduction from his salary. The retention of the within-grade salary increment was first raised before the headquarters Board of Appeal and therefore the complainant did not exhaust the internal means of redress.

18. The Tribunal considers that, in accordance with its jurisprudence, if an official receives an overpayment by mistake it should be reimbursed. Nevertheless, the Organization should take into account any circumstances

which would make it unfair or unjust to require repayment. In this case the payment of the complainant's monthly salary and allowances was made by SEARO on behalf of the United Nations which reimbursed it in full. SEARO is therefore owed no money. The WHO claims it did not sever all connection with the complainant while he was on secondment as he retained his right of employment in the Organization, which is true. But this does not make the overpayment a debt due to the Organization. It argues that it was responsible for recovering the overpayment. This might have been true if the Organization had not been paid in full by the United Nations. It claims *locus standi* by virtue of its fiduciary relationship with the United Nations, claiming it was accountable for the accuracy of the amounts charged to it and the reimbursement of money paid in error. While the Organization was responsible for the correctness of the calculations, it should be noted that they were certified as accurate by the United Nations. Also, while the WHO would be responsible for reimbursing any money it recovered as part of an overpayment to the United Nations, it is not clear whether there is an obligation for reimbursement where no money has been recovered. However, the Tribunal considers that the Organization's authority to demand repayment of money in the absence of any express authority from the United Nations, which is the actual creditor, is not established. As the complainant points out, the WHO's claim to be acting in a fiduciary position vis-à-vis the United Nations is contradicted by its decision to forgo almost 50 per cent of the overpayment.

19. In the Tribunal's opinion there is no indebtedness by the complainant to the Organization. It was responsible for making payments on behalf of the United Nations, but has been fully reimbursed. The Organization therefore, was not entitled to withhold the grants due or make deductions from salary under Rule 380.5.2 since the complainant was not indebted to it.

20. As the complainant is entitled to succeed on these grounds, there is no necessity to consider the interpretation of Financial Rule 106.4 or whether all the essential facts were taken into account by the Director-General when making his discretionary decision.

21. With regard to the withholding of the arrears of the salary increment of $122.66, this claim was not made until the matter was dealt with by the headquarters Board of Appeal. Accordingly, the complainant failed to exhaust the internal means of redress and this part of the claim is therefore irreceivable.

22. The complainant is entitled to have the decision of 27 March 1998 quashed and to have an order for payment of the grants amounting to $4,857.91 and the $100 per month retained by the Organization.

23. While he claims interest at 18 per cent per annum, the Tribunal will only grant 8 per cent from the date payment was due from the Organization to date of payment. The Tribunal refuses the complainant's claim for moral damages as he has benefited by the overpayment.

24. The complainant is entitled to a sum for costs which the Tribunal sets at $2,000.

DECISION

For the above reasons,

1. The decision of 27 March 1998 is quashed.
2. The Organization shall pay the sum of $4,857.91 and the $100 per month retained by the Organization.
3. The Organization shall pay interest at 8 per cent per annum on the said sum of $4,857.91 and the sum of $100 per month from the date payment was due by the Organization to the date of payment.
4. The Organization shall pay the sum of $2,000 in costs.
5. His other claims are dismissed.

In witness of this judgment, adopted on 7 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Registry's translation, the French text alone being authoritative.

EIGHTY-SEVENTH SESSION

***In re* Sehra**

Judgment 1850

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Parmjit Singh Sehra against the World Meteorological Organization (WMO) on 3 April 1998, the WMO's reply of 26 June, the complainant's rejoinder of 12 August and the Organization's surrejoinder of 16 September 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian who was born in 1947, joined the staff of the WMO in September 1991 on a twelve month fixed-term contract. From 1 November he occupied a post of instructor at grade L.4 in Harare, Zimbabwe, in the framework of a technical assistant project. His contract was extended until March 1994. At the end of his contract, he decided to stay in Harare with his family for a further six months at his own "cost [and] risk".

The complainant used the services of Libyan Arab Airlines to transport his personal effects when he travelled on 30 October 1991 from Tripoli

(Libya), where he was a teacher at the Faculty of Science, to Geneva to be briefed on his appointment in Zimbabwe. Two of his suitcases were lost on that occasion. The company Swissair helped to find one of them and sent it on to Harare.

By a letter of 1 March 1992, the Libyan airline requested the complainant to come and collect his second suitcase in Tripoli. The complainant was not able to make the journey.

In a communication of 4 February 1993, the secretary of the Claims Board explained to the complainant at his request the steps to be taken to claim compensation from the WMO. On 19 May 1993, the complainant replied that he preferred to obtain compensation from the Libyan airline, rather than from the WMO.

In a letter of 20 September 1994, he asked the Director of the Administration Department to request the intercession of the office of the United Nations Development Programme (UNDP) based in Tripoli to recover his suitcase or obtain compensation of 4,530 United States dollars from Libyan Arab Airlines. By a letter of 28 September, an official of the Personnel Division requested the UNDP office in question to intercede on behalf of the complainant. The UNDP Resident Representative replied in a letter dated 10 October 1994 that the sanctions decided upon by the United Nations against the Libyan Government had resulted in the closure of the airline's offices.

By a fax of 5 March 1996, addressed to the chief of the Personnel Division, the complainant claimed compensation for the loss of his suitcase. In a letter of 4 April 1996, the WMO informed him that, since he had not made a claim within the time limits allowed, it would not pay him compensation.

In the meantime, in September 1994, when he was in Geneva for debriefing following his assignment in Zimbabwe, the complainant was robbed on 6 September of his briefcase containing many documents, including his diplomas, certificates, identity documents, cash, etc. On the same day, he reported the theft to the police in Geneva.

In a fax of 1 February 1995, the complainant informed the chief of the Personnel Division that, having lost his original certificates, it was impossible for him to find another job. He wanted to know whether WMO could find him a job. On 2 February 1995, the chief of the Personnel Division replied to him that there was no vacant post corresponding to his qualifications. By a letter of 23 February 1996, the complainant repeated his request to the Secretary-General. On 25 February, he sent a second letter claiming the reimbursement of his travel expenses, his briefcase and the personal effects that it contained. On 11 March, the cantonal lost property office informed the complainant through the WMO that it had not found any of his personal effects. In a letter of 26 August 1996, the complainant complained to the Secretary-General that he had not received any compensation for the theft of his briefcase. He added that the loss of his certificates could only be compensated by the WMO giving him a job and asked the Secretary-General to transmit his case to the Claims Board so that it could decide on the compensation for the theft of his briefcase.

On 10 January 1997, the Claims Board issued its report. It explained that, according to the applicable rules, the WMO could not compensate the loss of documents. It recommended the payment of total compensation of 2,004 Swiss francs and rejected the request for a job in the WMO. In a letter of 4 February 1997, the secretary of the Claims Board informed the complainant that the Secretary-General had decided on 29 January to endorse the recommendations of the Board. The complainant replied in a letter of 8 November that he refused the compensation which had been offered to him, since it was too meagre in relation to the losses which he had suffered. He once again requested the Secretary-General to offer him a job and to reconsider his decision to refuse the compensation that he had claimed. In a letter of 24 December 1997, which is the impugned decision, the Secretary-General indicated that he was out of time in respect of his appeal against the decision of 29 January 1997. Moreover, since he had not made any claim concerning the loss of his baggage in 1991 within the time limits, no appeal was possible.

B. The complainant contends that the theft of his original educational certificates prevented him from finding a job. He submits that these are not "ordinary documents" and that they cannot therefore be excluded from any compensation. He indicates that the steps that he has taken at the universities which he attended have not enabled him to obtain duplicates of the certificates, because the records had been destroyed.

He asks the Tribunal to order the WMO to find him a job as compensation for the loss of his educational and professional certificates; to pay him 200 Swiss francs and 230 dollars as compensation for the cash which was stolen from him; and to obtain suitable compensation from the Libyan airline for the loss of his suitcase and to bear the costs.

C. In its reply, the Organization says that the complaint is irreceivable. It states that technical assistance project personnel are subject to specific staff rules, such as Project Personnel Service Note No. 112, entitled "Compensation for loss of or damage to personal effects". According to the terms of this Note:

> "1. ... project personnel shall be entitled, within the limits and under the terms and conditions established by the Secretary-General to reasonable compensation in the event of loss or damage to their personal effects, determined to be directly attributable to the performance of official duties on behalf of the World Meteorological Organization ...;
>
> 2. ...
>
> (b) No compensation shall be paid for any loss or damage which was occasioned by the negligence or misconduct of the claimant;
>
> ...
>
> 5. (a) No compensation will be paid for loss of or damage to [personal effects] as in the opinion of the Secretary-General cannot be considered to have been reasonably required by the claimant for normal living under existing circumstances."

Under the terms of point 7 of the Note, claims for compensation shall be made "within two months of the discovery" of the loss or damage. Since the claimant never made a claim, he is out of time. Moreover, he did not appeal against the decision of 29 January within the time limits set out in Staff Rule 1111.3(a).

Subsidiarily, it submits that neither the existing rules nor the general principles of insurance envisage that compensation could take the form of the offer of a job in the WMO. It explains that compensation can only be granted in respect of the loss of an article, but not the consequences of such a loss; that the loss of documents cannot be compensated by the WMO; that the papers do not appear to have been required by the complainant to lead a normal life in the existing circumstances, either in Geneva or Zimbabwe; and finally, that he has not demonstrated a clear link between the loss of the above documents and his difficulties in finding a job. It contends that the fact of carrying documents of this value constituted "an unreasonable risk", particularly since the Organization had not requested to examine them, and expresses surprise that the former universities of the complainant cannot supply him with duly certified duplicates of his certificates.

Because the briefcase was stolen from the complainant without the use of any force, it adds that he was "negligent" and refuses to compensate him for the cash lost in the theft.

As the complaint is ill-founded, the Organization refuses to pay the complainant compensation for costs.

D. In his rejoinder, the complainant states that the rules should include compensation for the consequences of the loss of educational certificates. He explains that the WMO only appointed him to his post after verifying his qualifications and that it could have required to see his certificates once again in September 1994. He alleges that his documents were necessary for his normal living in Zimbabwe.

Referring to the report of the Claims Board, he refutes the allegation that he was negligent on the occasion of the theft of his briefcase.

He submits that the Secretary-General and the Board could have made a more favourable interpretation of Service Note No. 112 and offered him a job. The WMO could also have recompensed the dedication that he showed in Zimbabwe in staying six months beyond the end of his contract to ensure the success of his mission.

He presses his claims to compensation for the loss of the other personal effects contained in his briefcase.

He submits that the loss of his baggage in 1991 was the consequence of the delayed action by the WMO in contacting UNDP and of the United Nations sanctions against Libya. He requests the WMO and the United Nations to pay him compensation or obtain a reimbursement from the airline.

E. In its surrejoinder, the Organization states that at no time did it request the complainant to provide his original certificates. It was therefore the complainant's own choice to take the risk of hand-carrying these documents.

It refuses to make a more favourable interpretation of the Staff Rules since, in any event, the complainant's claim that he be offered a suitable job is disproportionate to the loss incurred.

With regard to the loss of the baggage in 1991, it observes that the complainant's first claim to the WMO was only made in 1994.

CONSIDERATIONS

1. The complainant, who is an Indian national, joined the staff of the WMO on 1 September 1991 as an instructor in meteorology in Harare (Zimbabwe). His one-year fixed-term appointment was renewed on several occasions, until 5 March 1994.

At the beginning of September 1994, the complainant came to the WMO in Geneva for debriefing.

2. The facts at the origin of the dispute relate to: (a) the loss of his baggage in Tripoli at the end of October 1991 by the Libyan Arab Airlines; and (b) the theft of his briefcase in Geneva on 6 September 1994 while he was registering at a hotel.

3. By a letter of 20 September 1994, the complainant reported the loss of a suitcase on the occasion of his departure from Tripoli for Geneva in 1991. He estimated the value of his personal effects at 4,530 United States dollars. He requested the WMO to intercede on his behalf with the Libyan airline to retrieve his luggage intact or otherwise pay him compensation.

4. On 12 March 1996, the chief of the Personnel Division informed the complainant that his claim had been transmitted to the Claims Board.

On 4 April 1996, the secretary of the Claims Board replied that, according to the WMO standing instructions (Project Personnel Service Note No. 112, point 7): "Claims for compensation shall be made as soon as possible after the loss or damage and in all cases within two months of the discovery thereof ...". The time limit expired before the month of February 1992.

5. The second fact referred to by the complainant is the theft of his briefcase on 6 September 1994 after his arrival in Geneva for debriefing at the WMO. According to the report that he made to the police in Geneva, he was robbed of his briefcase which contained his original educational and professional certificates, his passport and his laissez-passer, his insurance card, air ticket, travellers cheques to a value of 3,250 dollars and 200 Swiss francs and 230 dollars in cash.

6. In his letter of 20 September 1994, referred to in 3 above, the complainant informed the WMO of these circumstances and announced his intention to submit a formal claim upon his arrival in India and determine the precise value of his loss.

On 1 February 1995, the complainant notified the WMO that, following the loss of his original educational certificates and testimonials, it had become impossible for him to find work. He also requested information on the possibility of obtaining a job in the Organization.

7. On 25 February 1996, the complainant reiterated his claims and requested compensation for the loss of his briefcase and cash, for the renewal of visas and his passport, as well as for the costs of his extended stay in Switzerland.

8. In his reply of 12 March 1996, the chief of the Personnel Division of the WMO informed the complainant that his application for employment had been transmitted to the Director of the Technical Cooperation Department. The latter informed the complainant one week later that there were no suitable vacant posts.

On 26 August and 19 November 1996, the complainant once again requested compensation for the loss of his briefcase and the costs of obtaining duplicates for his documents. He also pressed his claim to be found a job by the Organization.

On 4 February 1997, the complainant was informed that on 29 January 1997 the Secretary-General had approved the recommendations of the

Claims Board awarding him 2,004 francs for the loss of his personal effects and rejecting his request for a job.

9. On 8 November 1997, the complainant refused the compensation which had been offered and requested, by way of compensation, a job suited to his qualifications.

On 24 December 1997, the Secretary-General sent his reply to the complainant in which he informed him that he was out of time in his appeal against the decision of 29 January 1997 and that the claim for compensation for the loss of his suitcase in Tripoli in 1991 was time-barred.

It is this decision which is the subject of the present complaint.

10. The complainant asks the Tribunal to order the Organization: (a) to provide him with a job suited to his qualifications in the WMO as compensation for the loss of his original educational and professional certificates and testimonials which were in the briefcase; (b) to reimburse the cash which was in it; (c) to take the necessary steps to obtain compensation from Libyan Arab Airlines for the loss of his suitcase in 1991; and (d) to pay him costs.

11. According to point 7 of Service Note No. 112: "Claims for compensation shall be made as soon as possible after the loss or damage and in all cases within two months of the discovery thereof ...".

Insofar as the loss of his suitcase in Tripoli in 1991 is concerned, the complainant made no formal claim within the time limits allowed. His claim is therefore time-barred.

12. In relation to the theft of his briefcase in 1994, the complainant seeks compensation for the loss of his original educational and professional certificates, as well as the reimbursement of the cash.

Compensation for the loss of his original educational and professional certificates

The complainant is not seeking compensation for the value of the documents stolen, but a job in the WMO suited to his qualifications which, he says, would be the only possible compensation. He contends that the loss of the original certificates is preventing him from finding a job elsewhere. The complainant provides no convincing proof of the consequences which he says resulted from the loss of his documents.

13. It should be emphasised in the first place that the rules of the Organization respecting compensation for loss exclude the payment of any compensation for the loss of documents which cannot be considered to have been reasonably required for normal living under existing circumstances (Service Note No. 112, point 5(a)). Furthermore, these rules state that compensation can only be granted to replace the value of lost objects and not to cover the consequences of such a loss. Such an eventuality could only be considered in the case of negligence by the Organization towards its employee.

14. The complainant contends that it is impossible for him to obtain duplicates of his educational and professional certificates. This claim is untenable. It is difficult to believe that universities and other educational institutions are not able to provide duplicates or other attestations to their former students, as alleged by the complainant.

15. The complainant states that he was carrying the originals of his educational and professional certificates in the briefcase stolen in Geneva. The rules of the Organization concerning compensation for loss indicate that compensation can only be paid for the loss of personal effects considered to have been "reasonably required by the claimant for normal living under existing circumstances" (Service Note No. 112, point 5(a)).

The Organization cannot be held responsible for the fact that an expert travels with the originals of his university and other certificates, with all the risks that this involves.

Reimbursement of the sums in cash

In accordance with point 5(b) of the above Note, the maximum limit for compensation for the loss of cash is 400 dollars.

The Claims Board rejected this claim for compensation by the complainant on the grounds that he had been negligent in placing the cash in his briefcase and not in his wallet, and based its opinion on point 2(b) of the above Note, which states that: "No compensation shall be paid for any loss or damage which was occasioned by the negligence or misconduct of the claimant".

The Tribunal is of the same opinion. The negligence of the complainant appears evident in this regard.

16. Since the principal claims fail, so must the subsidiary claims.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative

EIGHTY-SEVENTH SESSION

***In re* Chevallier** **Judgment 1851**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Jacques Chevallier against the International Telecommunication Union (ITU) on 11 May 1998 and corrected on 26 June, the ITU's reply of 10 August, the complainant's rejoinder of 11 September 1998 and the defendant's waiver of its right to enter a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman born in 1937, joined the staff of ITU in the Radiocommunication Bureau as a designer at grade G.4 under a first short-term contract covering the period 23 June 1994 to 31 July 1994. His contract was regularly renewed until 31 July 1997.

With a view to rationalising its personnel policy, the Union decided that short-term appointment exceeding six months would be put up for competition. The complainant's job was accordingly announced in a vacancy notice for temporary employment No. 350, dated 12 June 1997. By a letter of even date, the complainant applied for the post. In July the deputy chief of the Personnel Department informed the official responsible for the selection, that it was impossible to appoint the complainant because as he was sixty he had reached the age limit.

ITU Staff Regulation 9.9 reads as follows:

> "Staff members shall not be retained in active service beyond the age of 60 years or, if appointed on or after 1 January 1990, beyond the age of 62 years. The Secretary-General may, in the interest of the Union, extend this age limit in exceptional cases, on the proposal of the Director of the Bureau concerned."

By a memorandum dated 25 July 1997, the complainant's first-level supervisor informed the official responsible for recruitment that the reasons given to justify the refusal did not appear to him to be valid and, in addition, that the decision would be harmful to the unit. By a memorandum of 29 July, the complainant appealed to the Secretary-General requesting him to reconsider his decision not to appoint him. He nevertheless received a special appointment contract from 23 September to 24 October 1997, which was renewed from 25 October to 24 December 1997.

On 20 October 1997, in the absence of a reply from the Secretary-General, the complainant lodged an appeal with the Appeal Board. The Board issued its report on 6 February 1998 and transmitted it to the complainant on 10 February. In the report, the Board indicated that it had not reached a unanimous conclusion and that it was submitting two recommendations. The chairman and a member of the Board considered that the Administration had followed the usual practice in the Union, but nevertheless stated that it would be desirable for the rules applicable in this respect to be aligned as rapidly as possible with the practice followed. However, the member representing the staff considered that "the ITU should apply the spirit of Staff Regulation 9.9 to staff recruited under short-term contracts". She recommended that the Secretary-General withdraw his decision.

B. The complainant puts forward several pleas. First, he contends that the impugned decision is illegal since the age limit of sixty years is not stipulated in any text applicable in the present case. Moreover, the practice to which the Union refers is contrary to the Note on the Staff Rules Applicable to Conference and other Short-term Service, which provides that those short-term Staff Rules "are to be read in conjunction with the Staff Regulations" of the Union. It is also contrary to Rule 12.1.2(b) of the ITU Staff Rules, which states that "Exceptions to the Staff Rules may be made by the Secretary-General, provided that no exception is inconsistent with any Staff Regulation ...". By virtue of these provisions, he contends that Regulation 9.9 providing for a retirement age of sixty-two must be applicable to him.

The complainant then submits that there was abuse of the discretionary power of the Secretary-General. In deciding not to award him the desired post, the Secretary-General did not correctly apply Regulation 9.9, as the Union did in fact call upon his services through a special appointment contract. He says that the practice of the Union is "contrary to that of the United Nations, by which the Secretary-General shall be guided", under the terms of Regulation 12.3.

Finally, the complainant contends that the competition procedure was not respected. He submits that his application was "the only one which fully complied with the qualifications required for the post of designer put up for competition". Since the vacancy notice did not specify any age limit, he held out legitimate hopes of being appointed to the post.

The complainant asks the Tribunal to quash the unwritten decision of the Secretary-General of the Union to refuse his appointment to the post put up for competition; to order the Union to appoint him to the post with effect from 1 August 1997; to order the Union to pay him a sum of 5,000 Swiss francs for moral injury and a sum of 5,000 francs in costs. Subsidiarily, if "reinstatement" is impossible, the complainant asks the Tribunal "to order the Union to pay him compensation corresponding to two years' salary and the purchase of his rights in the Pension Fund for the period 1 August 1997 to 31 July 1999, less any professional income during that period".

C. In its reply, the Union justifies its decision by citing its "constant practice". It also submits that it was entitled to entertain "doubts" as to the "personal qualities" of the complainant, as a "complaint" had been made against him by another official.

The Union recognises that the Short-term Staff Rules applicable in this case do not set an age limit, but it affirms that its practice is aimed at recruiting younger persons with a view to the "prospective management of human resources". It observes that there are currently no officials on short-term contracts who are over sixty years of age. The defendant also emphasises that this practice has developed by reason of the absence of any recent revision of the Staff Regulations and Staff Rules and that it had, together with the publication of various administrative circulars, given rise to "a body of supplementary rules". It adds in this respect that the work of reviewing and updating to fill this "gap" in the regulations is underway. This work has the objective of officially establishing the practice in question. Finally, the Union considers that it is independent with regard to its personnel management and there is no hierarchical relationship between its Staff Regulations and those of the United Nations Organization.

The Union rejects the plea of abuse of the discretionary power of the Secretary-General and submits that the recruitment of a younger person was in conformity with its personnel management objectives.

It contends that the competition procedure was respected. It explains that vacancy notices cannot contain all the information on the conditions of appointment, the nature of the contract which could be awarded, etc., all of which remain to be determined depending on the quality of the person ultimately selected as a result of the selection procedure.

D. In his rejoinder, the complainant cites the opinion of the Appeal Board in support of his contention that the complaint against him did not result in any disciplinary measures and cannot be held against him.

Concerning the practice referred to by the defendant, he responds that the question is not whether the practice is based on valid reasons, but whether it is "compatible with the applicable regulations". Furthermore, he says that only a formal decision by the competent bodies could justify the non-application of Regulation 9.9 to short-term contracts. Since such a decision has not been taken, the age limit must be sixty-two years. In this respect, he cites a report by the Tripartite Advisory Group on Human Resources Management, dated 24 April 1998, which recommends the extension of the "provisions of the Staff Regulations and Staff Rules by authorising supernumerary staff to remain in service until the age of 62". The complainant adds that the policy followed by the Union amounts to endorsing "discrimination and inequality of treatment between appointed officials and temporary staff".

On the question of not respecting the competition procedure, he rejects the defendant's explanations on the ground that they would render the procedure void of meaning.

CONSIDERATIONS

1. The complainant joined the staff of the International Telecommunication Union (ITU) on 23 June 1994, on which date he was offered a part-time short-term appointment until 31 July 1994. That contract was extended until 25 September 1994, and then converted into a full-time one from that date. His short-term contracts were renewed regularly until 31 July 1997.

For administrative reasons, the Union decided in 1997 to hold a competition for a temporary job covering the duties performed until then by the complainant. To this effect, it issued vacancy notice 350 on 12 June 1997.

2. The complainant applied for the post on the same day. His application was selected by his first-level supervisor, and subsequently by the chief of the Department concerned.

In the month of July 1997, the Personnel Department informed the official responsible for the selection that it was impossible to appoint the complainant to the job which had been put up for competition. The Department invoked the age limit of sixty years of age for temporary contracts, which obliged it to set aside the complainant, who had reached sixty years of age on 6 July.

3. On 29 July 1997, the complainant requested the Secretary-General to reconsider the implicit decision to reject his application. In the absence of a reply, he lodged an appeal with the Appeal Board on 20 October 1997. By a majority of two votes to one, the Board decided to reject the appeal. On 10 February 1998, the chief of Personnel transmitted the report of the Appeal Board to the complainant and informed him that he would be communicating to him the decision of the Secretary-General in the next few days.

In the absence of a decision by the Secretary-General, the complainant filed his complaint with the Tribunal against this implicit rejection.

4. The complainant principally seeks:

(i) the quashing of the implicit decision of the Secretary-General to refuse his appointment to the post put up for competition in vacancy notice 350 of 12 June 1997;

(ii) that the ITU be ordered to appoint him to the post with effect from 1 August 1997;

(iii) that the Union be ordered to pay him a sum of 5,000 Swiss francs for moral injury; and

(iv) that the Union be ordered to pay him a sum of 5,000 francs in costs.

If the Tribunal were to consider it impossible to order his "reinstatement", the complainant seeks subsidiarily that the Union be ordered to pay him compensation corresponding to two years' salary and the purchase of his rights in the United Nations Joint Staff Pension Fund for the period 1 August 1997 to 31 July 1999, less any professional income during that period.

5. The complainant puts forward three pleas against the implicit decision of the Secretary-General to accept the opinion of the Appeal Board of 6 February 1998, namely:

(a) the illegality of the decision;

(b) abuse of the discretionary power of the Secretary-General;

(c) failure to respect the competition procedure.

6. The complainant challenges the argument of the age limit invoked by the Union to reject his application to the post which was put up for competition. He recognises that the Staff Rules Applicable to Staff Members Engaged for Conferences and Other Short-term Service, which came into force on 1 January 1970, do not establish any age limit; however, he also submits that these Rules refer in their preamble to the Staff Regulations and that they must, therefore, be read in conjunction with the latter. The complainant accordingly cites Regulation 9.9, which establishes the age of

retirement at sixty-two years in the case of officials appointed after 1 January 1990. He contends that in the absence of a specific provision of the Staff Rules applicable to short-term service this Regulation should have been applied in his case.

7. The Union contends that its attitude was principally based on practice. It states in its reply:

> "... the principal reason for this decision was that the constant practice of the Union in the recruitment of short-term staff, and in the extension of short-term contracts, is to respect the age limit of 60 years."

It refers to the "Union's constant practice", to a "clear and constant practice" and to a "practice which has become constant". Similarly, the Appeal Board based its opinion on the "practice applied at the ITU" and on "current practice".

The defendant does not specify the legal nature of this practice; it does not say whether it is an administrative practice or a customary rule.

It is a well-established principle that the existence of written law does not need to be proved: the presumption *juris et de jure* assumes cognisance of written law. However, non-written rules have to be proved by those who invoke them. In the material case, the Tribunal has not found the slightest proof of the alleged practice. It cannot decide on a rule whose existence has not been proven. The absence of proof as to the existence of the rule invoked by the Union means that its decision has no legal basis.

8. In view of the Tribunal's finding in relation to the complainant's first plea, it is not necessary to examine the other arguments put forward in the complaint.

Taking into account the current age of the complainant, the Tribunal does not allow his claims that the implicit decision be set aside and he be appointed to the post. However, it allows in part his subsidiary pleas for compensation and, taking into account the harm of all types caused to him by the illegal rejection of his application, it sets the amount of the compensation that the Union shall pay him at 40,000 Swiss francs.

DECISION

For the above reasons,

1. The ITU shall pay the complainant, within four months of the date of this judgment, the sum of 40,000 Swiss francs.
2. The ITU shall pay the complainant a sum of 4,000 francs in costs.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

***In re* Macchino Farías (No. 3)**

Judgment 1852

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr Agustín Macchino Farías against the European Southern Observatory (ESO) on 4 March 1998 and corrected on 18 March, the ESO's reply of 27 July, the complainant's rejoinder of 24 August and the Observatory's surrejoinder of 27 October 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. On 18 April 1995, ESO concluded with the Chilean Government an Interpretative, Supplementary and Amending Agreement to the 1963 Convention between the Government of Chile and the European Organisation for Astronomical Research in the Southern Hemisphere for the Purpose of Establishing an Astronomical Observatory in Chile. The First Transitory Article and Article 6 of this Agreement, which came into force on 2 December 1996, obliged the Observatory to harmonise within one year the Regulations for ESO Local Staff in Chile with the essential principles of Chilean labour law.

An expert nominated by the Chilean Government was invited to and attended the meetings of the Working Group of the Finance Committee which was responsible for this harmonisation process. The Local Staff

Association was also consulted. The Council of ESO adopted the revised text of the Regulations for Local Staff in Chile on 19 November 1997. On 21 November, the Director General informed the Chilean Minister of Foreign Affairs of the adoption of the text and sent him a copy. On 4 December 1997, he transmitted it to all local staff members in Chile. In both communications, he indicated that the new Regulations would enter into force on 1 January 1998.

The complainant, a Chilean national who was born in 1947, has been a member of the staff of ESO in Chile since 1972. On 30 December 1997, he requested the Director General to declare that the new text would not come into force until the Government of Chile had stated that it was indeed in conformity with the essential principles of Chilean labour law and that it would not affect his acquired rights. By a letter of 16 January 1998, the head of Administration replied on behalf of the Director General that the Regulations had entered into force on 1 January and that any issue concerning the complainant's acquired rights would be decided on a case-by-case basis. This is the impugned decision.

B. The complainant contends that this decision is affected by a procedural flaw since the ESO Staff Regulations and the case law of the Tribunal obliged the Director General to consult the Joint Advisory Appeals Board.

He says that ESO disregarded the objections expressed by the Chilean expert and decided to apply the new text without having obtained the agreement of the host State. However, Article 6(3) of the Agreement provides that the part of the Regulations for Local Staff in Chile which establishes the essential principles of Chilean labour law may not be amended except by agreement between the contracting parties. The complainant adds that the revised text violates this provision by giving the Director General the authority to modify the terms of this part of the text without obtaining the approval of the Chilean Government.

Finally, the complainant argues that the text does not preserve his acquired rights, particularly those which he says he has acquired under several judgments of the Tribunal.

The complainant asks the Tribunal to quash the impugned decision, to declare that the revised version of the Regulations for Local Staff in Chile have not entered into force and that they could not affect his acquired rights. He also claims costs.

C. In its reply, the Observatory submits that the complaint is irreceivable on the grounds that the internal means of redress have not been exhausted. The request of 30 December 1997 could not be considered as an appeal, since the complainant did not challenge a decision, but requested the Director General to take two individual decisions by means of a general statement. Furthermore, even if the memorandum of 4 December 1997 was interpreted as implying a decision, such a decision would be of a general character, and has not as yet adversely affected the complainant.

Subsidiarily, the Observatory recalls that an expert from the Chilean Government participated in the procedure for the revision of the Regulations for Local Staff in Chile and that the Chilean Government did not oppose the text before its entry into force on 1 January 1998. The revised Regulations state that the Director General is competent internally for an amendment of the Regulations, and they do not address the issue of the Observatory's obligations with its host State.

Finally, respect for the acquired rights of the staff is a general principle of international civil service law, which is protected even without a specific provision in the Regulations. The Observatory notes that the complainant does not even indicate which acquired rights have been violated by the entry into force of the new Regulations.

D. In his rejoinder, the complainant contends that his request dated 30 December 1997 was indeed an internal appeal and that the Observatory had understood it as such since the head of Administration in his reply stated that "I should like to confirm the receipt ... of your request (apelación) ...".

On the substance, the complainant submits that the agreement of the Chilean Government could not be inferred from its silence. He produces a letter from the Minister of Foreign Affairs dated 23 January 1998, indicating that the expert appointed had observed that several provisions contradict the essential principles of Chilean labour law and requesting explanations. Finally, he contests the authority of the Observatory to take decisions on a "case-by-case" basis on the preservation of his acquired rights.

E. In its surrejoinder, the Observatory reaffirms its pleas and maintains its conclusions. It submits that the Spanish term "apelación" is not sufficient to give the complainant's request the quality of an internal appeal and that its diplomatic relations with its host State are not a subject to be discussed before the Tribunal.

CONSIDERATIONS

1. Although neither the complainant nor ESO has produced a copy of the complainant's original internal appeal to the Director General, dated 30 December 1997 (the document apparently not being in either of the Tribunal's official languages), it is clear, both from the Observatory's response and from the complainant's own submissions in support of his complaint, that his aim was to prevent the repeal of the former Combined Rules and Local Staff Regulations by the new Local Staff Regulations as of 1 January 1998.

2. The complainant does not identify any ESO decision which affects him directly. He seeks only to prevent the enforcement of the new Regulations, apparently from fear that their application might affect his acquired rights.

3. Manifestly, the complaint is irreceivable. The Tribunal's case law[*] is consistent to the effect that a complainant cannot attack a rule of general application unless and until it is applied in a manner prejudicial to him. This is a general attack which is not tied to any particular application of the impugned rules to the complainant. It will not therefore be considered by the Tribunal.

4. The complaint must accordingly be dismissed as irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

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[*] See Judgment 764 (*in re* Berte No. 2), 1329 (*in re* Ball and Borghini) and 1423 (*in re* Saunders No. 11).

In witness of this judgment, adopted on 7 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

***In re* Macchino Farías (No. 4)** **Judgment 1853**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr Agustín Macchino Farías against the European Southern Observatory (ESO) on 2 April 1998, the ESO's reply of 8 July, the complainant's rejoinder of 31 July and the Observatory's surrejoinder of 16 October 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Chilean who was born in 1947, has been a member of the local staff of the ESO in Chile since 1972. The ESO withholds at source and on behalf of the Chilean Government a tax on the income of the Chilean members of its local staff. Considering himself to be a victim of discrimination, the complainant requested on a date which has not been communicated to the Tribunal, but which is later than the delivery on 30 January 1997 of Judgment 1616 (*in re* Echeverría Echeverría and others), the retroactive reimbursement of the amounts which had been withheld from his salary. His request was rejected by a decision of 28 May 1997, against which the complainant filed an appeal to the Director General on 25 June.

In its report dated 24 November 1997, the Local Staff Joint Advisory Appeals Board noted that the 1963 Agreement between the Government of Chile and the European Organization for Astronomical Research in the

Southern Hemisphere for the purpose of establishing an Astronomical Observatory in Chile did not oblige the ESO to withhold taxes from its Chilean staff members and recommended that the Director General review the regulation if he could not justify the measures taken. By a letter of 27 February 1998, which is the impugned decision, the head of Administration rejected the appeal on behalf of the Director General and observed that the 1963 Agreement and the Combined Staff Rules of 1993 provide for a differentiation between members of the Observatory's staff who are subject to Chilean taxation and those who are not.

B. The complainant, citing the case law of the Tribunal, contends that all the staff of an international organisation shall enjoy equal treatment. By virtue of the principle of the hierarchy of rules, the Regulations for ESO Local Staff in Chile cannot be in contradiction to the Combined Staff Rules applicable to all members of ESO personnel without distinction as to their status, and cannot be in contradiction to Article IV 2.03 of these Rules which states that taxes levied shall be reimbursed. The Director General therefore committed an error in law in issuing the Regulations for Local Staff.

According to the complainant, the 1963 Agreement provides that the privileges and immunities of the ESO are identical to those applied to the United Nations Economic Commission for Latin America. The local staff recruited by the Commission is not subject to Chilean taxation. He considers that if the ESO enjoys the same status as the Commission, its local staff cannot be treated differently as regards the taxation of their income.

The complainant asks the Tribunal to quash the impugned decision, to order the reimbursement of the taxes levied on his remuneration and the payment of an indemnity equivalent to all the sums deducted and, subsidiarily, to state that the Observatory is not entitled to withhold taxes from his remuneration and that it must therefore refrain from the practice. He claims costs.

C. In its reply, the Observatory contends that it is obliged by the Agreement signed with the Chilean Government to make a distinction between international staff members and local staff members and to withhold taxes from the latter. However, it denies that this amounts to discrimination, since the situation of the two categories of staff is different and the distinction applied is a result not of its own making, but of the differing wishes of its member States and Chile. It also recalls that international staff are subject to an internal tax.

The Observatory adds that the 1963 Agreement limits the granting of the privileges accorded to officials of the United Nations Economic Commission for Latin America on its territory to employees of the Observatory who are of foreign nationality. Furthermore, Article IV 2.03 of the Combined Staff Rules, taken in conjunction with its preceding provisions, only covers the situation where taxes are directly levied on remuneration despite a tax exemption provided in a bilateral or multilateral agreement, which is not the case of local staff members.

D. In his rejoinder, the complainant refutes the contention of the Observatory that it is under an obligation to withhold taxes from its local staff members. In his view, the failure to reimburse the amounts withheld constitutes a violation of the principle of equality of treatment.

E. In its surrejoinder, the ESO observes that it has always levied taxes on its local staff on behalf of the Chilean authorities without objection from the staff, and it considers that the complainant shows bad faith in requesting tax reimbursement now. It adds that the Chilean Government has never requested that ESO refrain from applying this practice, proving that it interprets the 1963 Agreement in the same manner as the Observatory. The complainant does not demonstrate that he has suffered any damage and is therefore not justified in claiming an indemnity.

CONSIDERATIONS

1. The complainant, a Chilean national, is a member of the "local staff" of the European Southern Observatory (ESO) in Chile. The Chilean government and the ESO have always considered these staff members as being subject to Chilean national income tax. By contrast, members of the "international staff" are treated as international civil servants and are exempt from income tax both in the countries of which they are nationals and in Chile where the Observatory has established some of its facilities.

2. The "Combined Staff Rules" adopted by the Council of the Observatory govern generally the legal relationship between the ESO and its personnel. They are applicable to both local and international staff (see Judgment 1616, *in re* Echeverría Echeverría and others).

3. Chapter IV, section 2, deals with the subject of taxation as follows:

> "IV 2.01 Members of the personnel shall comply with national tax laws and regulations applicable to them.
>
> IV 2.02 The application of tax exemptions which are granted to certain categories of members of personnel by member states or states where ESO has established its facilities, shall remain restricted to members of the personnel concerned.
>
> IV 2.03 The Staff Regulations shall lay down the conditions and terms under which taxes levied directly on remunerations and benefits paid by the Organization shall be reimbursed.
>
> IV 2.04 Members of the personnel may be subject to an effective system of internal taxation on their emoluments. The details shall be set out in the Staff Regulations."

4. A good deal of the argument by both parties before the Tribunal has been devoted to the precise meaning to be given to various Articles of the Agreement between the Government of Chile and the ESO. The Tribunal will not enter into this debate which, in any case, is irrelevant.

5. The Tribunal does, however, have jurisdiction over the complainant's claim for reimbursement of taxes pursuant to Article IV 2.03 of the Combined Staff Rules. That claim was refused by the Administration on 28 May 1997. His appeal to the Director General was, notwithstanding a favourable recommendation from the Local Staff Joint Advisory Appeals Board, dismissed on 27 February 1998. That is the impugned decision.

6. The complainant raises two points. The first is that Article IV 2.03 of the Combined Staff Rules creates a right to a reimbursement of taxes and an obligation on the Administration to adopt regulations governing such claims. The short answer to this point is that a reading of the remainder of Chapter IV makes it plain that while only certain members of staff are entitled to tax exemption, all of them must comply with national tax laws relating to them. To the extent that the complainant bases his claim to reimbursement on the Administration's obligation to adopt a regulation

pursuant to Article IV 2.03, that obligation has been met by the adoption of Local Staff Regulation LS IV 2.01 which reads as follows:

> "Local Staff Members who are subject to taxation on the basis of national laws on tax payment cannot receive any compensation from the Organisation."

7. Article R IV 2.01 cited by the complainant does not apply to him; it forms part of the Staff Regulations applicable to staff other than local staff engaged in Chile.

8. The complainant's second point is that Article LS IV 2.01 quoted above discriminates against him by making him subject to tax while members of the international staff are not. This plea fails since the Tribunal has already ruled that different treatment of national and international staff is not discrimination. In Judgment 1196 (*in re* Andrews and others) it was said:

> "As for the second part – the argument about discrimination in favour of local staff – all that need be said is that according to consistent precedent the distinction between international and local staff is a fundamental one inherent in the very nature of an international organisation. It is due to the peculiar circumstances in which such organisations work and it is concurred in, with both its advantages and its drawbacks, by anyone who seeks employment with them, be it in one category of staff or in the other. Each category of staff offers career prospects and conditions of recruitment and pay that differ according to its own requirements, and a staff member may not plead breach of equal treatment if treated differently because he belongs to one category rather than to the other."

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

***In re* González Lira** **Judgment 1854**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Germán González Lira against the European Southern Observatory (ESO) on 3 July 1998, the ESO's reply of 23 October, the complainant's rejoinder of 20 November 1998 and the Organization's surrejoinder of 21 January 1999;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Chilean who was born in 1947, joined the ESO in 1969, under an indefinite contract as an administrative assistant at its La Silla observatory in the Chilean Andes. At the material time he held grade B2.

By a letter dated 28 August 1991 the ESO told him his post there would be abolished at the end of 1992. It offered him the post of general administrative assistant in Antofagasta, in the Paranal region where the Very Large Telescope (VLT) was under construction. The letter said that the incumbent of the post would report "functionally to the Chile Administration and operationally to the VLT [Site and Building] group" but that "after the period of construction of the VLT, this post would reintegrate the Chile-Administration department". The complainant was assigned to the post.

At the end of 1995, however, during the final phase of construction it became necessary to locate at the Paranal site some of the coordinating activities carried out previously by the Antofagasta office. The complainant was assigned to a new position of general administrative assistant at Paranal, reporting to the Administrator in Chile, with certain benefits including, on an exceptional basis, a rent allowance for housing in Antofagasta. In 1996 he had responsibility for General Services and Logistics of the Paranal observatory. Further reorganisation took place on that site in 1997 and ESO needed to convert the complainant's post into one for an administrator with overall responsibility for VLT administration.

The Administrator in Chile told the complainant by a letter of 18 June 1997 that his post would be abolished and his contract terminated as from 31 July 1997 under Articles LS II 5.03 and LS II 5.04(10) of the Regulations for ESO Local Staff in Chile, viz. for "reasons determined by the functional necessities of the Organisation". He told him that despite ESO's attempts to find him another post none had been found.

The complainant appealed to the General Manager in Chile against the abolition of his post and claimed certain "statutory rights". The General Manager confirmed his decision on 28 July 1997. The complainant subsequently appealed to the Director General at headquarters, in Garching near Munich in Germany, who referred the matter to the Local Staff's Joint Advisory Appeals Board, in La Silla, which reported on 12 March 1998. Reinstatement, in its opinion, was not feasible, but it recommended a recalculation of the complainant's indemnities to consider an *ex gratia* bonus he had requested to cover reimbursement of unpaid rent allowance. In any case it offered to mediate with a view to a new negotiation between the parties. By a letter of 28 April 1998 – which the complainant impugns – the head of Administration told the complainant that the Director General was upholding the decision to terminate his contract and asked for his "views on any new elements of discussion which could lead to a final settlement" of his case.

B. The complainant pleads that his dismissal was unlawful. In terminating his contract ESO did not abide by the rules on reassignment. He had an indefinite contract and ESO should have taken steps to find him other duties. Article R II 6.10 of the international 1983 Staff Regulations says as much and Article LS II 1.15 applicable to local staff and headed "Transfer due to the requirements of the service" provides, he submits, for such reassignment. If ESO did make attempts to find him a post they were carried out in secrecy. Moreover he pleads that ESO went back on its promise of 1991 that "after the period of construction of the VLT" his post would "reintegrate the Chile-Administration department".

The decision to dismiss him was arbitrary. His position still existed: another staff member was on the post. Besides the duties of the job description for his post and the duties for the "Paranal Administrator" ESO advertised for in order to replace him were practically the same. Besides his type of "technical job" will still be needed at the Paranal observatory. ESO replaced him with a newcomer on a mere fixed-term contract without a rent allowance: there was no reason to dismiss him.

He seeks the quashing of the Director-General's decision of 28 April 1998, reinstatement, payment of salary from 1 August 1997 up to the date of his reinstatement and costs. Failing reinstatement he claims an award of damages "equivalent to five times [his] total gross remuneration for the period from 31 July 1996 up to 31 July 1997", plus interest at 12 per cent a year, from the date of filing this complaint. Likewise he claims the indemnity of 44,421,762 Chilean pesos offered by ESO in a letter dated 3 July 1997 with a cost-of-living adjustment from 1 August 1997.

C. In its reply the Observatory submits that an organisation "may revise and restructure its operations" and "take the necessary decisions affecting its staff" even if it means terminating appointments of staff on indefinite contracts. For the operative phase of the Paranal observatory the ESO needed to put in place an administrator performing some of the complainant's duties but with considerably increased responsibilities. The complainant lacked the training and leadership experience required to take "overall responsibility for the VLT administration". ESO rejects the allegation that it wanted to recruit someone on a fixed-term contract and without a rent allowance.

It did make efforts to find him alternative employment, but none was found. The Appeals Board thought reinstatement would only be possible in a post "hierarchically" independent of the ESO Administrator in Chile, the complainant's supervisor, as their working relationship had soured. Posts in the Chile Administration were thereby excluded. No other post was available except one which would be filled in late 1999.

In line with the recommendation of the Appeals Board ESO sought agreement with the complainant on the financial terms of his separation and negotiated a 50 per cent increase of his statutory indemnities and end-of-contract benefits. The complainant demanded other benefits equal to an increase of nearly 100 per cent. It asserts that the complainant has received the termination indemnities he is entitled to and refused the offer "for an amicable settlement".

D. In his rejoinder the complainant argues that the ESO's promise still stood. The offer of a post of general administrative assistant in 1995 at Paranal ratified the decision of 1991 to assign him to the post at Antofagasta. So when he took the post in 1995 he still trusted in ESO's former promise that his post "would reintegrate the Chile-Administration department".

He reiterates that his post was not abolished: it was a "continuing one". The Appeals Board too doubted whether any "real suppression of post was made".

While it is true that the Board did not recommend reinstatement because of the deteriorating relationship with his supervisor it did recommend, he says, an award of damages and a "new negotiation in order to achieve an harmonic agreement".

At the complainant's request, in a draft document dated 25 June 1997 ESO had offered to round the amount up to 51,783,000 pesos. He was advised that the monthly rental allowance was to be calculated in his termination indemnities as it was part of his "permanent package of remuneration". The only way the personnel officer in Chile had allowed for the rental allowance in that sum was as an "additional ex gratia payment" amounting to 10,553,000 pesos. The fact that the ESO Administration at headquarters did not approve the amount agreed in Chile gave rise to his internal appeal.

E. In its surrejoinder ESO rebuts the complainant's arguments and enlarges on its pleas. The offer of the post of general administrative assistant in Paranal in 1995 carried no such promise of reintegration into the Administration in Chile.

It is misleading to say the complainant's post continued. The post of Paranal administrator required higher professional qualifications than the complainant had and involved larger responsibilities.

ESO rejects the suggestion that it wanted to "get rid of" the complainant because he enjoyed a rent allowance. He adduces no evidence in support of his allegation. Moreover he had appealed against a decision of the General Manager in Chile relating to the allowance in early 1997 and the matter appeared "closed and settled".

There was no "agreement on an amicable settlement" during negotiations preceding the filing of the present complaint. ESO's personnel officer in Chile had no power to "accept" a proposal. After discussions with the complainant, proposals were referred to ESO headquarters for a decision by the Director General.

CONSIDERATIONS

1. The complainant joined the European Southern Observatory (ESO) on 1 May 1969, as a local staff member. He was granted an indefinite contract as an administrative assistant at the ESO's observatory at La Silla, in the Chilean Andes, about 700 kms north of Santiago.

2. Some years ago, the ESO commenced a project to establish a Very Large Telescope (VLT) at the Paranal observatory, which is on a mountain at a distance of 130 km from the town of Antofagasta, about 1,200 kms north of Santiago.

3. In 1991, the ESO Council decided to restructure its activities at La Silla in view of the development of the Paranal VLT, which was still under construction. That entailed a substantial reduction in activities at La Silla, making the post held by the complainant redundant. A letter dated 28 August 1991 offered him the post of "general administrative assistant" at Antofagasta where he was expected to reside; it also stated that after the construction of the VLT "this post would reintegrate the Chile-Administration department". He accepted that post.

4. During the final phase of the construction of the VLT the Administrator in Chile informed the complainant by a letter dated 20 December 1995 that the ESO considered it necessary to relocate a number of administrative activities from Antofagasta to Paranal, "which [was] expected to increase the interaction and support given to the construction activities, and in the near future operations, in Paranal"; and that accordingly the ESO had decided to create a post of "general administrative assistant" at Paranal. The Administrator also undertook "to initiate a review of the post's grade in time for possible consideration by the Director General in the 1996 Advancement Review process". The complainant accepted that post.

5. It had been agreed that when the complainant took up residence in Antofagasta the ESO would reimburse the rent of his house. Accordingly, when the complainant first moved to Antofagasta, he was reimbursed the full amount of the rent he paid. Later he moved to another house, paying an increased rent. The Administrator refused to reimburse anything more than the previous rent, updated according to the consumer price index. On appeal, the General Manager ruled, on 24 March 1997, that the complainant should have been aware that he could not increase his house rental without previous authorisation; that his conduct seriously eroded ESO's trust in his capacity to handle financial matters; but that, exceptionally, his claim for increased reimbursement would be allowed because his employment conditions did not expressly specify a ceiling; and that any future modification would require the authorisation of the Administrator.

6. During that period, since the construction phase of the Paranal VLT was coming to an end and the VLT was expected to begin to operate in early 1998, the ESO was considering the reorganisation of the administrative structure required for the operative phase of the VLT. By letter dated 18 June 1997 the Administrator informed the complainant that in order to ensure "a close and efficient collaboration of the Administrative Unit with the activities of the Engineering, Technical and Scientific Teams" it had been considered necessary to replace his post with "a new post with functions and responsibilities substantially higher and different service requirements"; that his post would therefore be suppressed from 31 July

1997; and that after careful study it had been found that there was no other post within the ESO which would be suitable for him given his experience and qualifications. A few days later, the ESO issued a vacancy notice in respect of the new post of "Paranal Administrator".

7. On 5 August 1997, the complainant lodged an internal appeal in respect of the suppression of his post and the termination of his contract. Having interviewed the Administrator and others, the Local Staff's Joint Advisory Appeals Board concluded on 12 March 1998:

(a) that in terms of a modification to the complainant's contract, agreed upon when he was transferred to Antofagasta, he had the option to claim reimbursement of rent in lieu of the zone allowance of 15 per cent of the basic salary plus four *aguinaldos*; that neither an amount nor a ceiling had been stipulated; and that the increased rent he had paid was reasonable;

(b) that the ESO Administration (and the Administrator in particular) considered that expecting the ESO to pay for the increased rent was an arbitrary act and a breach of faith or abuse of authority by the complainant; and that this incident had damaged the working relationship between the Administrator and the complainant;

(c) that although it was "considerably questioned" before that incident whether the complainant was suitable for the new post, afterwards he was definitely excluded from consideration;

(d) that it was not clear that there was "a real suppression of post ... since in practice [the complainant's] functions [continued] in a new post with broader authority"; and that the termination of his contract was caused mainly by a loss of confidence in him by his supervisor, the Administrator; and

(e) that the possibility of reassigning the complainant had not been really analysed, although he held a permanent contract and had no bad performance appraisals.

8. However, the Appeals Board did not recommend the reinstatement of the complainant because his working relationship with the Administrator was seriously damaged, unless reinstatement was possible in a post not

hierarchically dependent on the Administrator. On 28 April 1998, the Director General decided to maintain the decision appealed against.

9. The complainant contends that the functions which he had been performing continued to be required even after the new Paranal observatory became operational, and that in fact the duties of the new post of "Paranal Administrator" were substantially the same as those of his former post. The termination of his contract was thus arbitrary. He further asserts that there is no evidence that the question of his transfer to another post was ever considered. He asks the Tribunal to quash the Director General's decision, communicated on 28 April 1998, and to order his reinstatement; and, if that is not possible or advisable, to award him compensation in a sum equivalent to five times the gross remuneration paid for the period from 31 July 1996 to 31 July 1997, with interest at 12 per cent per annum from the date of his complaint, together with the termination indemnity offered by the ESO in a letter dated 3 July 1997.

10. It is not disputed that an international organisation has the right to restructure its operations, suppressing posts if necessary and consequently terminating the appointments of staff members, even if they had contracts of indefinite duration. However in such cases the organisation is obliged to do its utmost, and in good time, to try to find alternative employment for them.

11. The ESO submits that the operative phase of the new Paranal observatory required an Administrator who would be responsible for administration and logistics "with new and substantially larger responsibilities which exceeded [the] complainant's qualifications and experience"; that although the Paranal Administrator's duties included some of the complainant's functions, he had also "to take overall responsibility for the VLT administration and to autonomously identify, analyse and solve the service needs of the observatory", "responding autonomously to the needs of the service at all levels in Paranal and Europe"; and that this was the reason why the post required a university degree or equivalent, preferably in business management, which the complainant did not have.

12. The vacancy notice for the new post stipulated that the Paranal Administrator "will report to the Administrator-ESO Chile and will work in close liaison with the Paranal Director". Three tasks were specified: taking "responsibility for the Logistics and Administrative Support functions at the Paranal Observatory"; the planning, coordination, execution and control of purchase and procurement cycles, commuting and communication services, vehicle maintenance, safety and security, and general administration services; and the supervision of subcontracted services.

13. The job description of the complainant's post stated that he would report to the Administrator in Chile; that its purpose was "to ensure that Paranal Construction and Operations receive the agreed upon level of administrative and logistical support"; and that because ESO outsources logistical support, his primary responsibility would be to "supervise, coordinate and control" the providing of services by contractors. There followed a detailed description of his "main responsibilities", consisting of administration, board and lodging, commuting (including the maintenance of vehicles), provisioning, and safety and security.

14. Not only are the functions listed virtually identical, but the vacancy notice made no express mention of any need for the Paranal Administrator to have to function "autonomously" in any particular respect.

15. It is true that the complainant did not have a university degree, which was one of the requirements for the new post. However, that requirement in itself did not make the functions of the new post different from the old one. By changing the requirements ESO manifested its desire to have those functions performed by a person with higher academic or professional qualifications, but it does not prove that the complainant, who had twenty-eight years of experience with the ESO, was unable to perform them.

16. The Tribunal notes also that when the complainant was offered the post of general administrative assistant in Paranal, it was contemplated that the post would not terminate at the end of the construction phase: it was expected to continue even thereafter, providing administrative and logistical support for VLT operations in Paranal. Furthermore, the undertaking which

the Administrator then gave – to initiate a review of the grade of the complainant's post – is consistent with the recognition, even in 1995, of his ability to perform the functions of that post at a higher level of responsibility.

17. The complainant has thus shown that, *prima facie*, the functions of the new post were substantially similar to his post, and within his capabilities; and that one of the reasons why he was not selected for the new post was because – as the Joint Advisory Appeal Board concluded – the ESO and the Administrator wrongly considered him guilty of a breach of faith or abuse of authority in claiming increased rent reimbursement. On the other hand, the ESO has failed to prove that the new post did have greater responsibilities; or that it was higher in grade than the old one; or that its greater responsibilities were recognised by way of higher remuneration. It has also failed to explain what steps were taken to initiate a review of the grade of the complainant's post.

18. In the circumstances, the Tribunal holds that there was no genuine suppression of the complainant's post, and that the termination of his contract was caused mainly by an unjustified loss of confidence in him by the Administrator.

19. The ESO submits that during the early part of 1997 the future of the complainant's post was repeatedly discussed; and that when it was found that the requirements of the new post exceeded the complainant's qualifications, the Administrator and the Director of the La Silla observatory were asked to search for a post to be offered to him. It was reported that there was none, the nearest possibility being that of a warehouse administrative assistant on Paranal, which would have been open for application only in late 1999. Despite the complainant's assertion that there is no evidence that the question of his reassignment was ever considered, the ESO has to produce any internal memoranda, reports or other material pertaining to that matter. The Tribunal holds that the ESO has failed to prove that it did its utmost, and in good time (Judgment 1745, *in re* de Roos, under 7 and 8) to try to reassign the complainant.

20. The impugned decision must therefore be set aside. As for relief, the complainant has throughout been willing to accept compensation in lieu of reinstatement. Therefore the Tribunal will exercise its discretion under Article VIII of its Statute (as in Judgment 1586, *in re* da Costa Campos and Judgment 1745) to let the ESO choose between two options. It shall either reinstate the complainant with effect from 1 August 1997, or pay him compensation in a sum equivalent to three times the total gross remuneration paid for the period from 31 July 1996 up to 31 July 1997 (in addition to the termination indemnities already offered or paid by the ESO). The complainant is also entitled to interest on unpaid sums at a rate of 8 per cent per annum as from 3 July 1998, the date of the filing of this complaint, until the date of payment. If the ESO reinstates the complainant, any termination indemnities already paid will be set off against arrears of salary.

DECISION

For the above reasons,

1. The Director General's decision communicated on 28 April 1998 is set aside.
2. The ESO is directed either to reinstate the complainant or to pay him compensation, as set out in 20 above.
3. The ESO is directed to pay the complainant a sum of 2,000 United States dollars in costs.
4. The complainant's other claims are dismissed.

In witness of this judgment, adopted on 7 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Mark Fernando, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

MICHEL GENTOT

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EIGHTY-SEVENTH SESSION

***In re* Wright** **Judgment 1855**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Jonathan Peter Wright against the European Patent Organisation (EPO) on 26 June 1998 and corrected on 17 August 1998, the EPO's reply of 6 November, the complainant's rejoinder of 6 December 1998 and the Organisation's surrejoinder of 11 January 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a British citizen born in 1964, joined the staff of the European Patent Office, the EPO's secretariat, in 1990 in Directorate-General 1 (DG1) at The Hague. At the material time he was an examiner, at grade A3, in DG2 in Munich.

On 24 November 1995 he completed a form claiming, under Circular 22, two-and-a-half days of special leave to attend a preparatory course for the European Qualifying Examination on 30 November and 1 December in Geneva. His supervisor signed the form adding "in the interest of the Office", but on 30 November the Personnel Department in DG4 refused his request on the ground that "DG2 have decided that special leave for preparation courses for the European Qualifying exams can not be granted".

The complainant attended the course and the Office granted him financial assistance to do so, under Article 5 of Circular 172, but did not allow his application for special leave. In a letter of 26 February 1996 he asked the President of the Office to reverse the decision to refuse him the leave as other officials had been allowed such leave to attend the same course in 1994 and early 1995: otherwise his letter was to be treated as an internal appeal. On 6 May 1996 the President confirmed the rejection of his claim on the grounds that in 1995 a decision had been taken to stop granting special leave for those preparation courses. In any event, he added, in the past before such leave could be considered the official had to have "completed the internal training as examiner". This meant that "the 'experience-coefficient' must have reached 100%": a condition not met in his case.

The Appeals Committee reported on 7 January 1998. The majority recommended the rejection of the complainant's appeal. A minority argued in his favour since at the time of his request he had a legitimate expectation that leave would be granted to him and had not been informed of changes in the policy of leave-granting in good time.

By a letter of 31 March 1998 – the impugned decision – the President endorsed the opinion of the majority and rejected his appeal.

B. The complainant submits that special leave for the course he attended should have been granted to him. He filed his request with the "appropriate" department under Circular 22, Rule 3 (1) which says:

> "All applications for special leave, and for additional leave for travel time in connection with any case of special leave, shall be referred to the appropriate Personnel Department with the recommendation or otherwise of the official competent to countersign applications for annual leave."

Rule 3 (iii) b) of that circular requires that in the granting of such leave "due account shall be taken of the requirements of the service". His director countersigned his claim and wrote that the leave was "in the interest of the Office".

The EPO, he pleads, unlawfully denied him his right to "sound, consistent and transparent management". It supplied no evidence of DG2's purported decision to cease granting special leave for preparatory courses for the European Qualifying Examination. Besides which his director in DG2 approved his claim. The President's letter of 6 May stated that a claimant for special leave had to have "completed the internal training as examiner". The complainant argues that the Administration has not proven that this condition existed or was made public at the time of his application. In any event, according to the 1996 Training Development Guide, already in circulation at the time he made his claim, special leave could be granted for training for the European Qualifying Examination.

Moreover, the training clearly did serve the interest of the Office although it refused his special leave, since it granted him financial assistance under Article 5.1 of Circular 172 towards the cost of the course.

He seeks the grant of two-and-a-half days of annual leave and 2,000 German marks in costs.

C. In its reply the Organisation submits that the complaint is unfounded. The decision to grant special leave is a discretionary one. The EPO was justified in adopting a restrictive practice because under the terms of Article 29 of the Service Regulations vocational training has to be "compatible with the proper functioning of the service". Circular 22 states that "the requirements of the service" must be considered when taking a decision. Special leave was refused because there was a "growing backlog" of work in DG2 at the time. It was the "principal director responsible for administration in DG2" and not the complainant's supervisor, who had the final say: a course that is "in [the] interest of the Office" is not necessarily consistent with "the requirements of the service".

The complainant had not reached the "experience coefficient" of 100 per cent required by the Handbook for DG2. He was an examiner in the Search Directorate (DG1) in The Hague, but in Munich his work involves substantive examination, for which he has not yet completed the internal training. As from 1995 the Organisation grants special leave for the European Qualifying Examination, but not for the preparatory courses.

The fact that the Office might bear part of the cost of the course will not necessarily result in the grant of special leave. It is the Training Department which decides on financial assistance whereas the Personnel Department decides on the grant of leave, basing its decision on the opinion of management in the relevant Directorate-General.

D. In his rejoinder, the complainant submits that an administrator in the Personnel Department "summarily overruled" his supervisor's decision to support his claim. The policies invoked by the defendant to support the refusal of his claim were unknown to the staff. At the time he made his claim for leave he was not aware of them and neither was his supervisor.

He recognises that the grant of special leave is discretionary: the discretion "was exercised in his favour" when his supervisor approved his claim for leave.

E. In its surrejoinder the EPO explains that only the Personnel Department has the discretionary power to grant leave and that it does so after a recommendation from the claimant's supervisor.

The EPO denies a lack of transparency in its policy for authorising special leave. The policy for training is based on Article 29 of the Service Regulations and Rule 3 of Circular 22. It "deliberately refrained" from laying down detailed rules for granting special leave, in order to have "a certain degree of flexibility on the grant of training facilities".

It points out that the complainant has never claimed to have reached the 100 per cent "experience coefficient". He was aware of the Handbook for DG2 and from that publication it is clear that examiners do not reach that level with less than three years' training. Both he and his supervisor were aware of the condition. He had been transferred to Munich only two years before he claimed special leave and so, he did not fulfil the condition.

CONSIDERATIONS

1. The complainant appeals against the decision of the President of the European Patent Office, accepting the majority recommendation of the Appeals Committee to dismiss his appeal against the refusal of the Organisation to grant him special leave to attend a two-day training course in Geneva.

2. Since it is common ground that the decision as to whether or not to grant a staff member special leave to attend training courses is discretionary, it is clear that the principal pleas put forward by the complainant are without merit. The fact that his request for special leave was approved by his immediate superior can be of no assistance to him since such approval was obviously subject to acceptance at a higher administrative level. Likewise, the complainant could not have had a reasonable

expectation that the discretion would necessarily be exercised in his favour. Finally, the fact that the reasons given for the initial refusal by the Personnel Department were inadequate does not confer any rights upon the complainant since full reasons for the exercise of discretion against him were later given.

3. There is, however, one aspect of this matter which requires closer examination: (a) the governing provision of the Service Regulations is Article 29, which reads as follows:

> "The Office shall facilitate such further training and instruction for permanent employees as is compatible with the proper functioning of the service and is in accordance with the interests of the permanent employees. Such training and instruction shall be taken into account for the purposes of promotion in their careers."

(b) Two subordinate rules dealing with the application of this provision are also relevant: Rule 3 (iii) b) of Circular 22 makes the grant of special training leave as applied for by the complainant subject to "the requirements of the service"; and, Article 5.1 of Circular 172 provides for the grant of financial assistance to staff members who attend a training course provided it "serves the interests of the Office".

4. The complainant applied for both special leave and financial assistance in connection with the two-day training course in question. He was denied the former but granted the latter.

5. While the decision to grant financial assistance and to refuse special leave may appear incompatible, the obligations under Article 29 of the Service Regulations to facilitate training may involve different considerations when one looks at the desirability of the staff member's taking such training, and when one has regard to the effect of the staff member's absence on the functioning of the service. In the present case, the refusal of special leave was justified by the growing backlog of patent applications. The impugned decision was accordingly not flawed so as to require the Tribunal's intervention.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

EIGHTY-SEVENTH SESSION

***In re* Ochani (No. 2)** **Judgment 1856**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Parmanand Sachanand Ochani against the World Health Organization (WHO) on 29 April 1998, the WHO's reply of 31 July, the complainant's rejoinder of 12 August and the Organization's surrejoinder of 13 November 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. By Judgment 1827 of 28 January 1999 the Tribunal dismissed Mr Ochani's first complaint.

The complainant, a citizen of India born on 28 September 1937, used to be a staff member of the WHO's Regional Office for South-East Asia (SEARO) in New Delhi. His son, who was studying in the United States, underwent dental treatment there on 13 and 14 September 1995 and on 29 December 1995 the complainant submitted a claim for reimbursement of his treatment under the Staff Health Insurance scheme.

On 8 April 1996 the complainant was summoned to see the Regional Personnel Officer and another personnel officer in order to explain the calculation of the dental surgeon's receipts submitted with his claim, which had been referred to the Regional Surveillance Committee of the scheme, as it appeared that sums on the receipts had been altered. The dentist's statement for 13 September showed itemised treatment costs of 176 United States dollars but a payment of 976 dollars, and the one for 14 September showed costs amounting to 686 dollars but a payment of 1,686 dollars, resulting in an overall discrepancy of 1,800 dollars for which the complainant was claiming reimbursement.

By a letter of 9 April 1996 the Insurance Officer of the scheme sought corroboration of the sums from the dentist concerned, which he provided on 23 May. The Regional Personnel Officer also wrote to the complainant on 9 April asking him to supply a written explanation to elucidate the discrepancies. The complainant was on sick leave until 26 May inclusive, and at his request the time limit for replying was extended. In a letter of 17 June he explained that he would be able to research discrepancies if the record of all payments made on behalf of his son to the dentist concerned could be made available to him for inspection.

The matter was referred to the Headquarters Surveillance Committee which was to meet on 25 June. On 14 June the secretary of the Regional Committee gave him notice of this, told him he had the right to communicate his comments in writing before the Committee made a recommendation to the Director-General and invited him to submit his comments to the Committee by the 24th. Consideration of the case was subsequently deferred until the investigation into the disputed claim was complete.

The Regional Personnel Officer told the complainant in a letter of 5 July 1996 that he had already been provided with all the information he needed to produce the explanation required from him and that disciplinary action, including dismissal, was being considered. The complainant asked in a letter of 10 July 1996 to be allowed to withdraw his claim for reimbursement of the dental expenses; that measures other than his dismissal should be envisaged or, failing that, he requested early retirement. The next day he proffered in a letter a further option which was "mutual separation".

The Regional Director accepted conditionally his request for early retirement under Staff Rule 1010 and the Regional Personnel Officer so informed him in a letter of 15 July, also accepting the withdrawal of his claim. However, on 22 July the complainant withdrew his request for early retirement, contending that he had wanted to know in advance the terms and conditions of the option chosen by the Organization and that Staff Rule 1010 governed resignation and not retirement. The Organization in turn rescinded its conditional acceptance of his early retirement.

By a letter of 31 July a personnel officer informed him that he would be dismissed for misconduct under Staff Rule 1110.1.4 with effect from 5 August 1996. The Regional Surveillance Committee reconvened to examine the complainant's case. It decided to pay certain of his health insurance claims, but not the disputed dental claim. At the complainant's request his appeal went to the headquarters Board of Appeal, which reported on 3 February 1998, recommending his dismissal. The Director-General endorsed its recommendation and, on 5 March 1998, rejected his appeal. That is the decision under challenge.

B. The complainant pleads that there were procedural flaws in the action the Organization took against him.

From reading together Staff Health Insurance Rules 560, 562 and 564 and WHO Manual paragraphs IV.1.310-345 it is clear, he contends, that any action taken in a case of committed or attempted fraud is to be governed by the Insurance Rules. Apart from a reference to "disciplinary action" in IV.1.320 the relevant Manual paragraphs do not provide for the type of disciplinary proceedings instituted against him.

Furthermore Rule 560 states that: "If it is established that fraud has in fact been committed or attempted, the case shall be referred to the Headquarters Surveillance Committee or to the regional surveillance committee concerned". A prerequisite should have been to "establish" that fraud had been committed and only then refer the matter to the relevant Surveillance Committee. The complainant should also have been allowed the opportunity to communicate his comments in writing to the Headquarters Committee before it made a recommendation to the Director-General.

The WHO denied him the chance to see the exchange of correspondence with the dental surgeon. The complainant could not know what discrepancies or alterations were alleged, and therefore could not render an explanation.

The Organization acted in breach of the Staff Rules and Manual. The procedure to dismiss him was flawed because the letter of dismissal dated

31 July 1996 cited Staff Rule 110.8 on misconduct but did not specify the relevant subparagraph. From the terms of that letter it appears that the Organization acted as final arbiter, but did not clearly establish the charge against him and there was no opportunity for adversarial proceedings. Furthermore the Regional and Headquarters Surveillance Committees "abdicated their functions to the Administration". Two parallel procedures were put in motion against him: one under the Insurance Rules and another under the Staff Rules.

The Administration did not comply with Staff Rule 1130 under which a staff member may not be dismissed for misconduct "until he has been notified of the charges made against him and has been given an opportunity to reply to those charges". Under Manual paragraph II.9.490 a proposal to terminate an appointment for misconduct should be based on a report prepared by the supervisor, "stating the established facts": the "subjective conclusions" of the Personnel Department were taken to be established facts. No action was taken to find out the extent of the complainant's involvement in the matter.

The Administration "was driven by malice and arbitrariness". Even though there were inconsistencies in the unsigned statements of account supplied by the dental surgeon, the evidence went against the complainant. The Administration intimidated him, threatening him with dismissal, and violated the rules of natural justice.

At the request of an insurance assistant he went to SEARO on 3 March 1997 to settle pending medical claims. As the complainant refused to part with a cheque issued to him in error the official "grappled" with him, causing his glasses to break. On 7 March he received a letter from the Regional Personnel Officer accusing him of destroying the dentist's original receipts during that incident.

He seeks: (1) the quashing of the Regional Director's order dated 31 July 1996 dismissing him and "proforma reinstatement as he has since attained the age of superannuation. The period from the date of dismissal (31 July 1996) to the date of his normal retirement (30 September 1997) be treated as period spent on duty for all purposes and with all consequential benefits like payment of salaries, restoration of health insurance cover, after-service participation in the Staff Health Insurance Scheme (which was agreed to by the Head, SHI/HQ on 24 March 1993), pensionary benefits and release of all his pending medical claims, etc."; (2) an award of 200,000 United States dollars in damages for moral injury; and (3) 10,000 dollars in costs.

C. In its reply the Organization argues that there was clear evidence of misconduct in that the figures on the receipts had been tampered with. A slightly different black pen had been used to change the two disputed figures. The complainant had destroyed the original receipts on 3 March 1997 and they could not now be submitted in evidence. An "account status report" provided subsequently by the dental surgeon confirmed a costing of 862 dollars and not 2,662 dollars, resulting in the same difference of 1,800 dollars. The complainant had previously argued that payments had been made by third parties, but that argument was unsound as he never suggested who they might be or what amounts they had paid. In any event he had requested reimbursement of charges for services not received, and that amounted to an act of misconduct. The onus was on the complainant to submit an accurate claim backed up by accurate documentation.

The Organization submits that the complainant had been given ample opportunity to defend himself. The decision to dismiss him was taken in its best interests as a proper exercise of its authority and without personal prejudice. It denies the complainant's allegation that it sought his dismissal at all costs. It had even tried to settle the matter in a manner avoiding his dismissal, but the complainant retracted his request for retirement.

As for the incident of 3 March 1997 it refutes the complainant's version. It was the complainant who asked to see his file and then snatched it from the officer's hands, destroying the receipts at the same time.

The Organization met the requirements of the Staff Rules in the procedure it followed to dismiss him. By its letter of 9 April 1996 he was notified of the charges against him and given the right to reply: he knew on what evidence the charges rested.

The initiation of a dual procedure was not contrary to the Staff Rules either. Fraud under the Staff Health Insurance Rules also constitutes misconduct under Staff Rule 110.8 which can lead to a disciplinary measure being taken against him under Rule 1110.

D. In his rejoinder the complainant enlarges on his pleas and maintains his claims.

He denies the receipts had been "altered". He reiterates that on 3 March it was the insurance assistant who "beleaguered and assaulted" him and who destroyed the receipts.

Only in its reply did the Organization use words like "falsified" in connection with the charge against him. Only after his dismissal did it speak of "a slightly different black pen" being used to change the figures. It did so with "tongue in cheek" as the receipts no longer existed as evidence. Those were "lame attempts" to show there was a charge against him, as evidence of discrepancies is in itself no charge.

At no stage was the dental surgeon asked about the discrepancy between the itemised charges and the total sums on the receipts "which may have been occasioned on account of third party cash payments" and therefore the charge against him remains unsubstantiated.

E. In its surrejoinder the Organization presses its arguments.

It reaffirms that the complainant destroyed the original receipts when he snatched the file from the insurance assistant. It insists that it had spoken of "alterations" to the complainant from the outset and particularly in its letter to him of 9 April 1996 on the matter. The charge against him was therefore established.

The complainant had the responsibility of ensuring that his claim and supporting documents were accurate. He had ample opportunity to send the receipts back to the dentist for recertification before submitting his claim. The Organization offered the complainant an opportunity of seeing again the original receipts on which all the charges hinged. It respected his right of defence.

CONSIDERATIONS

1. The complainant was employed by the WHO at its Regional Office for South-East Asia (SEARO) in New Delhi as from 1988. He was dismissed because he had failed to furnish a satisfactory explanation for submitting two altered receipts in support of a claim for reimbursement of

expenses incurred for dental services provided for his son in the United States.

2. His claim, dated 29 December 1995, included a request for reimbursement of 2,662 United States dollars. That was supported by two receipts showing total charges and payments as follows:

Date	Charges	Payments
13.9.95	$ 976	$ 976
14.9.95	$ 1,686	$ 1,686

However, the itemised charges set out in the body of the receipts added up to only 176 dollars and 686 dollars – a difference of 1,800 dollars – giving rise to the suspicion that "176" had been altered to "976", and the "1" added before "686".

3. At the request of the WHO, the dentist furnished computer printouts of his "account status" and "billing information" for the complainant's son. These showed that charges totalling 176 dollars made on 13 September 1995 had been settled by a BANKCARD payment on 18 September; that charges totalling 686 dollars made on 14 September had been settled on 25 September by the reversal of one item of 385 dollars and a BANKCARD payment for the balance of 301 dollars; and that, in all, charges totalling 477 dollars had been settled in full by two BANKCARD payments.

4. On 8 April 1996 the Regional Personnel Officer and another personnel officer at SEARO discussed the discrepancies with the complainant. According to their "Note for the Record", he maintained that his son had paid the full amount of 2,662 dollars, but he could not explain what other services had been rendered besides those shown in the receipts. Indeed, he alleged that the dentist himself had changed the amounts without specifying any additional services rendered; and after examining the "account status report", he claimed that the dentist had demanded 1,800 dollars in cash, which his daughter had paid, but no receipt had been issued. Finally, he offered to withdraw his claim, but was told that an

official investigation was being carried out and that his written explanation would be called for.

5. By letter dated 9 April 1996, the Regional Personnel Officer sent to the complainant copies of the receipts and the computer printouts, and asked him to submit, by 19 April, a written explanation of the alterations and discrepancies. As he was on sick leave, he endorsed that letter to the effect that he would furnish his explanation on his return to work, and that he had verbally "explained [his] point of view during the meeting on 8 April".

6. Also on 9 April, the Insurance Officer at SEARO wrote to the dentist asking for clarification as to the amounts actually charged in September 1995, and whether the amount of 385 dollars had been paid. The reply by fax of 23 May stated that the 385 dollars had not been paid because the patient had decided to wait; and that the value of the services rendered and paid for in September was 477 dollars.

7. On his return from sick leave on 27 May, the complainant asked for and was given time till 17 June "to prepare and furnish" his explanation. By a letter dated 17 June, he informed the Regional Personnel Officer that he was already in touch with his son to obtain full particulars of cash payments made to the dentist by third parties on behalf of his son; that until his son's entire medical record and the record of all payments (including cash and third party payments) had been obtained from the dentist and made available to him, he would be unable to offer his comments; and that he denied the charge of alteration made in the letter dated 9 April.

8. Replying on 5 July 1996, the Regional Personnel Officer said that copies of all relevant documents had already been given to the complainant, but offered to show him the originals again; that not having received a satisfactory explanation, disciplinary action, including dismissal for misconduct under Staff Rule 1110.1.4, was being considered; and that it had been decided to give him a further opportunity to furnish a written explanation (in accordance with Staff Rule 1130) by 17 July in respect of the discrepancies and "third party payments".

9. Instead of an explanation, in his reply dated 10 July, the complainant offered three options by way of compromise. He suggested, first, that he be allowed to cancel and withdraw his entire medical claim of 29 December 1995, without prejudice to his denial of the charge of alteration; or, second, that he be permitted "to take 'constitutional responsibility' only", and that accordingly a disciplinary measure less severe than dismissal be considered; or, third, that he be allowed to take early retirement. On 12 July he suggested a fourth option: separation on terms to be agreed mutually.

10. On 15 July the Regional Personnel Officer, while pointing out that the complainant had not provided any clarification regarding the alterations and the "third party payments", informed him that the Regional Director had approved his early retirement as from 1 August subject to certain conditions.

11. Due to disagreements as to the basis of retirement, the settlement fell through. Thereupon, by letters dated 17 and 23 July, the Regional Personnel Officer told the complainant that his letters of 10 and 12 July would be considered as his final reply to the letter of 5 July which was issued in accordance with Staff Rule 1130.

12. On 31 July the complainant replied to the letters of 5 and 23 July reiterating the position that he had taken up in his letter of 17 June. He also asked for the return of the original receipts for recertification by the dentist of all payments made, as the dentist had insisted on the originals being submitted for that purpose.

13. On the same day, a personnel officer informed the complainant that in his several replies he had not provided a satisfactory explanation for the alterations in the receipts, and that it had accordingly been determined that an attempt had been made to defraud the Staff Health Insurance scheme, which amounted to misconduct within the meaning of Staff Rule 110.8, for which the Regional Director had decided to dismiss him with effect from 5 August 1996 with one month's salary in lieu of notice.

14. The complainant appealed to the regional Board of Appeal on 20 August 1996. There was undue delay by the regional Board in dealing with that appeal, and on 17 June 1997 the headquarters Board of Appeal granted the complainant's request to be allowed to appeal directly to it. On 3 February 1998, the Board concluded that the receipts had been falsified, that the complainant was responsible for the claim which he had submitted, and that the Administration had acted in accordance with the Staff Rules in imposing disciplinary measures. It recommended dismissal of the appeal. On 5 March 1998 the Director-General accepted that recommendation. The complainant asks the Tribunal to quash the decision to dismiss him, and to award him compensation in a sum of 200,000 United States dollars, and to consider the time from 31 July 1996 to 30 September 1997 as being a period of service with all consequential relief. He claims costs.

15. The complainant's first contention is that allegations of fraud can only be dealt with in accordance with the Staff Health Insurance Rules 560, 562 and 564, read with WHO Manual paragraphs IV.1.310-345, and that the only permissible penalty for such fraud is the suspension of or exclusion from Staff Health Insurance benefits: any other administrative action or penalty is *ultra vires*.

The Staff Health Insurance Rules mentioned above provide:

> "560 All cases of fraud, confirmed, attempted or suspected, against the funds of the Insurance, shall be dealt with in accordance with the procedure for reporting and follow-up of cases of fraud and losses of cash or property laid down in IV.1.310-345. If it is established that fraud has in fact been committed or attempted, the case shall be referred to the Headquarters Surveillance Committee or to the regional surveillance committee concerned.
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> 562 The Headquarters Surveillance Committee examines the case in the light of its facts and circumstances and may recommend to the Director-General the full or partial suspension or exclusion of the benefits and entitlements of the participant concerned. Regional surveillance committees examine cases referred to them ... in the light of the facts and circumstances and may recommend, through the regional director, to the Headquarters Surveillance Committee, the full or partial suspension or exclusion of the benefits and entitlements of the participant concerned. The participant is given the opportunity to communicate his or her comments in writing to the Headquarters Surveillance Committee before any

recommendation is made by the latter to the Director-General on the measures described in these provisions.

564 The Director-General takes his decision on the suspension or exclusion of participation in the Insurance on the basis of the recommendation of the Headquarters Surveillance Committee ..."

16. The WHO Manual provides:

"IV.1.310 Any fraud, confirmed, attempted or suspected, ... must, on discovery, be immediately reported to the assistant director-general responsible for administration and financial matters ...

IV.1.320 At the same time, or as soon as possible afterwards, a full, detailed report is prepared by the director, support programme, in the regions ... stating clearly the particulars of the amount involved, the circumstances under which the fraud or loss took place, and the corrective or disciplinary action, if any, taken at the office where the loss occurred."

17. A fraud or an attempted fraud in respect of the funds of the insurance gives rise to two distinct issues. One is whether the staff member, *qua* participant in the Staff Health Insurance, should be allowed to continue to enjoy the benefits of participation in the scheme; and for that the Staff Health Insurance Rules 560, 562 and 564 prescribe the procedure and the consequences. The other is whether, *qua* staff member, he should be subjected to a disciplinary measure. The Insurance Rules and the Manual confer no jurisdiction on the Headquarters Surveillance Committee or the Regional Surveillance Committee in that respect, but recognise, on the contrary, that cases may be referred to those committees after it is established that fraud has been committed or attempted, and even after disciplinary action has been taken. Therefore the Administration was entitled to take disciplinary proceedings against the complainant before the Headquarters Surveillance Committee dealt with his case.

18. The complainant's second submission is that the WHO failed to notify him of the charges made against him – with sufficient precision to enable him to render an explanation – and thus infringed Staff Rule 1130, which provides:

> "A staff member may not be ... dismissed for misconduct ... until he has been notified [in writing] of the charges made against him and has been given ... eight days ... within which to submit his reply ..."

Manual II.9.490 provides:

> "A proposal to terminate an appointment for misconduct is based on a report prepared by the supervisor or by another authorized WHO staff member stating the established facts considered to constitute misconduct. The charges are notified to the staff member, who is given an opportunity to reply within eight days ..."

19. The complainant further alleges that the WHO was in correspondence with the dentist, and that its actions were largely based on that correspondence, and that because he was not furnished with copies, he could not understand what discrepancies or alterations were alleged against him, and thus was prevented from rendering an explanation. He could not rebut evidence that was being concealed from him, and this constituted a denial of natural justice.

20. The Regional Personnel Officer's letters of 9 April and 5 July 1996 satisfied the requirements of the Staff Rules. The complainant's attention was drawn to the "established facts", namely, the alterations in the receipts and the discrepancies between the services rendered and the payments made, as well as the applicable Staff Rules; he was given copies of the four documents which contained the evidence against him; and he was allowed eight days to reply. The correspondence with the dentist (including the reply by fax mentioned at 6 above) added nothing to the allegations or the evidence against him, and the failure to give him copies of that correspondence in no way affected his ability to render an explanation or to defend himself. Indeed, while the complainant now tries to make out that "the alleged alterations or discrepancies could never be construed as charges" against him, yet his letters of 17 June and 10 July show that he knew full well that a "charge" of alteration had been made on 9 April, which he denied without complaining of any lack of precision or particulars.

21. Thirdly, the complainant claims that the charge has not been proved. By lodging his claim for reimbursement, the complainant represented to the WHO that services had truly been rendered on 13 and

14 September, that the dentist had in fact made charges totalling 2,662 dollars for those services, and that this amount had actually been paid in full. However, the receipts and the computer printouts established, *prima facie*, that for the services rendered on 13 and 14 September the dentist had charged, and was paid, only 477 dollars.

22. The Tribunal ruled in Judgment 1070 (*in re* Couton) that when a staff member files a claim for reimbursement of medical expenses he "had a duty to make sure that the 'supporting documents' were genuine and he could not shirk it by shifting responsibility to his former wife and professing his own ignorance and good faith"; and that breach of that duty amounted to misconduct warranting dismissal.

23. The explanation which the complainant gave on 8 April was that the dentist himself had altered the figures in the receipts without specifying what additional services had been rendered. Even if the complainant's assertion that he submitted the receipts exactly as they were when his son had received them from the dentist is true, nevertheless neither he nor his son ever said that additional services had actually been rendered, or provided a shred of evidence that anyone had paid the dentist 1,800 dollars in cash. Thus the inescapable conclusion is that the complainant filed his claim knowing that the receipts had been altered to include charges of 1,800 dollars for services not actually provided, and payments of 1,800 dollars not actually made. He knew therefore that he was not entitled to reimbursement from the Staff Health Insurance scheme, and it is not surprising that later he offered to withdraw his entire claim. The Administration was justified in concluding that the evidence established that the complainant had acted improperly in claiming reimbursement.

24. The complainant's fourth argument is that the Administration violated Staff Rule 110.8 in finding him guilty of misconduct without specifying which subrule it relied on. Staff Rule 110.8 provides:

> "Misconduct" means:
> 110.8.1 any improper action by a staff member in his official capacity;
> 110.8.2 any conduct by a staff member, unconnected with his official duties, tending to bring the Organization into public discredit;

110.8.3 any improper use or attempt to make use of his position as an official for his personal advantage;

110.8.4 any conduct contrary to the terms of his oath or declaration.

25. The Tribunal holds that the complainant's conduct fell within one or more of those subrules, and that it was unnecessary to specify in which one.

26. The complainant's final contention is that the entire proceedings against him were vitiated by malice, prejudice and caprice: that upon a mere suspicion that he had altered the receipts the WHO prejudged his guilt, kept threatening him with imminent dismissal, and denied him a fair hearing.

27. The evidence shows that the charges were made after an investigation, and were based on documents, and that the complainant was given several extensions of time to reply. None of this suggests personal prejudice. Notifying him of the disciplinary measures that could result in the absence of a satisfactory explanation was perfectly proper. The fact that the WHO was prepared to settle the matter in a manner that would have avoided dismissal is strong evidence of the absence of prejudice.

28. The complainant also refers to an incident which occurred in March 1997. Even if his version of that incident is true, it has no relevance to the question whether there was personal prejudice at or before the time of dismissal.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

***In re* Ochani (No. 3)** **Judgment 1857**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr Parmanand Sachanand Ochani against the World Health Organization (WHO) on 15 May 1998, the WHO's reply of 31 July, the complainant's rejoinder of 12 August and the Organization's surrejoinder of 13 November 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The background to this case is set out in Judgment 1856 also delivered this day on Mr Ochani's second complaint.

On 29 December 1995 the complainant submitted a claim under the Staff Health Insurance scheme for reimbursement of his son's dental treatment in September 1995. The Organization considered that two amounts on the dentist's receipts had been altered and an investigation followed. On 9 April 1996 the Administration sought clarification from the dentist concerned, which was received on 23 May, and the Regional Personnel Officer asked the complainant to provide a written explanation to say why the figures did not tally. He was on sick leave from that date until 26 May, and on his return to duty he asked for more time in which to provide his justification for the discrepancy. By a letter to him of even date a personnel officer set a new time limit of 17 June, which was later extended to 21 June at the complainant's request.

The complainant enquired on 29 May about the reimbursement of local currency medical bills presented in 1996 on 22 January, 11 March and 10 May. However, on 30 May 1996 the Regional Personnel Officer informed him that "pending the outcome of the investigation" settlement of his outstanding health insurance claims had been suspended and reimbursement would not be "effected at the present time". The complainant protested but, in a letter of 14 June, the secretary of the Regional Surveillance Committee made it clear to him that his insurance had not been stopped, that the Headquarters Committee was to review his case on 25 June and invited the complainant to provide his comments to the Committee by the 24th.

By a letter of 22 July the complainant asked the Regional Personnel Officer to have the undisputed medical insurance claims released to him and claimed a payment of "24% commercial interest for misutilising [his] monthly contributions plus unpaid reimbursable amounts". He appealed to the regional Board of Appeal on 24 August against the suspended settlement of his outstanding health insurance claims.

Meanwhile, in the light of a decision taken on 31 July to dismiss the complainant with effect from 5 August 1996 the Regional Surveillance Committee reconvened. It decided to settle the claims that were in order, thereby excluding the disputed dental bills, a claim submitted out of time, and others not substantiated by proper evidence.

In its report of 3 February 1998 the headquarters Board of Appeal to which the matter was referred by the complainant recommended the rejection of his appeal. The Director-General endorsed that rejection on 5 March 1998, which is the decision under challenge.

B. The complainant pleads that in "terminating his health insurance cover while simultaneously continuing his membership" of the Staff Health Insurance scheme the Administration committed "a gross impropriety and a grave injustice". It imparted "two punishments for one cause of action" as it instituted disciplinary proceedings against him and also stopped his health insurance cover.

He submits that on return from sick leave at the end of May he had requested an extension of the time limit for explaining the discrepancy in the receipts as he was unaware of the correspondence exchanged during his leave by the Administration and the dental surgeon: he became aware of it only after his dismissal. Without waiting for his explanation the Administration took "punitive action" against him by withholding payment of his local currency bills. Denying him reimbursement while collecting monthly contributions from him was tantamount to "cheating". He affirms that the action taken against him infringed Rules 562 and 564 of the Staff Health Insurance inasmuch as it was within the power only of the Director-General to take the course of action adopted by the Administration. Besides which the Organization gave no reason for withholding refunds on undisputed medical claims.

In this third complaint he seeks: (1) an award of moral damages of 200,000 United States dollars; (2) a payment to him of "24% commercial interest on the reimbursable funds denied to him and on the misutilisation of the monthly contributions recovered from him"; and (3) an award of 10,000 dollars in costs.

C. In its reply the WHO argues that it was justified in suspending refunds of the complainant's outstanding health insurance expenses as a "provisional and precautionary measure" to protect the Organization. The complainant had delayed providing his written explanation for over two months.

At no time did the Organization terminate his health insurance cover. The letter of 14 June to the complainant from the secretary of the Regional Surveillance Committee made that clear to him. In the end it settled all the claims properly submitted, thereby rendering his complaint devoid of any cause of action.

The WHO did not infringe the applicable rules. In the event of fraud being proved, suspension or exclusion from health insurance benefits "effectively apply" from the date of the fraud. A combined reading of WHO Manual paragraph IV.1.320 and Insurance Rule 562 did allow the Organization to take dual measures in the form of disciplinary action and a stoppage of insurance cover.

Without the falsification of the receipts no precautionary measure would have been necessary. The complainant's claim for moral damages is therefore "frivolous" and he adduces no evidence of injury.

D. In his rejoinder the complainant insists that there is no provision in the Health Insurance Rules for "provisional" or "conservatory" action.

He requests reimbursement of a bill dated 28 October 1994 for 110.50 dollars for medical treatment, which was considered out of time by the Organization under Health Insurance Rule 350, and also claims reimbursement of sums of 434 dollars and 51.66 dollars that it claimed were "not supported by official receipts".

In view of the "vindictiveness" shown by the Organization and its "transgression of law" and WHO rules, he presses his claim for compensation "plus any further relief that the Tribunal may deem fit".

E. In its surrejoinder the WHO submits that the complainant's request in his rejoinder for reimbursement of "improperly submitted" health insurance claims is a new plea. In any event it correctly applied Rule 350 in rejecting his outdated claim. The claim for 434 dollars was not backed up with proof of payment, and the one for 51.66 was not reimbursed for want of any details of the treatment provided.

It reiterates the arguments put forward in its reply and repeats that it was justified in taking the precautionary measure of suspending reimbursement until after the investigation, and the complainant suffered no injury. It reimbursed all his undisputed claims on 26 February 1997.

The complainant cited Rules 562 and 564 concerning "full or partial suspension or exclusion of the benefits and entitlements of the participant concerned". No decision under those rules was ever taken, and they do not apply to his case. He does not allege the infringement of any other rule; neither could he as no rule precluded the precautionary step the WHO took.

CONSIDERATIONS

1. The complainant was employed by the WHO at its Regional Office for South East-Asia (SEARO) in New Delhi as from 1988. On 29 December 1995 he made a Staff Health Insurance claim for reimbursement of dental expenses to the value of 2,662 United States dollars, submitting in support two altered receipts. By letter dated 31 July 1996 he was dismissed for misconduct with effect from 5 August 1996. Judgment 1856 (*in re* Ochani No. 2), delivered today, sets out the facts leading to his dismissal.

2. On 9 April 1996 the complainant was asked to submit, by 19 April, his written explanation as to the alterations and discrepancies in his claim. He asked for, and was given, extensions of time until 21 June.

3. The claim made by the complainant on 29 December 1995 was for a total of 4,019.63 dollars. Later, he made three more claims, dated 22 January, 11 March and 10 May 1996 for Indian rupees 5,800, 3,232.90, and 38,368.07, respectively.

4. The complainant's present grievance arises from a letter dated 30 May 1996 from the Regional Personnel Officer informing him that "pending the outcome of the investigation into [his] staff health insurance claims, the settlement of all outstanding claims has been suspended".

5. In his reply dated 10 June, the complainant questioned what he called the suspension of his Staff Health Insurance coverage, particularly as the WHO was continuing to collect monthly insurance contributions from him.

6. Under Staff Health Insurance Rules 560, 562 and 564 (quoted in Judgment 1856, at 15) a decision regarding the suspension or exclusion of insurance benefits and entitlements could have been taken only by the Director-General, on the recommendation of the Headquarters and the Regional Surveillance Committees.

7. On 14 June the secretary of the Regional Surveillance Committee replied to the complainant, stating that his insurance coverage had not been

stopped; that the Regional Surveillance Committee, having concluded that a *prima facie* case of attempted fraud had been established, had recommended to the Headquarters Surveillance Committee (through the Regional Director) the full suspension of his insurance benefits and entitlements; that the Headquarters Surveillance Committee was to consider his case on 25 June; and that he had the right to communicate his comments to the Headquarters Surveillance Committee by 24 June. He added that the Administration was justified in withholding payment of the complainant's claims pending a final decision under Rule 562.

8. Thereafter the complainant was informed that the Headquarters Surveillance Committee had met and decided to postpone its review until the Administration had concluded its investigation in terms of Manual paragraphs IV.1.310-345. By letter dated 5 July, the Regional Personnel Officer reiterated that his outstanding claims would not be settled pending a final decision.

9. The complainant appealed to the regional Board of Appeal on 24 August 1996 against the decision to suspend reimbursement of his outstanding insurance claims. There was undue delay by the regional Board in dealing with that appeal, and at the complainant's request the headquarters Board of Appeal decided on 17 June 1997 to allow him to appeal to it directly. On 3 February 1998 the Board concluded that the Administration's decision to suspend temporarily payment of outstanding claims pending the outcome of the inquiry was justified, and recommended dismissal of the appeal. On 5 March 1998 the Director-General accepted that recommendation. The complainant now impugns that decision, asking the Tribunal to award him 200,000 dollars on account of material, moral, punitive and exemplary damages, and interest at 24 per cent on "the reimbursable funds denied to him and on the misutilisation of the monthly contributions recovered from him". He claims costs.

10. While that appeal was pending, the Regional Surveillance Committee met on 27 September 1996 and decided that "all the pending claims, excluding the disputed ones, be reviewed as to their correctness/genuineness and settled as soon as possible". Thereupon, dealing with his first claim, the Administration disallowed the disputed claim

of 2,662 dollars, and allowed a sum of 615.17 dollars in respect of the balance. The other three claims were allowed in full, except for a sum of 470 Indian rupees. It is not disputed that those sums were paid on 26 February 1997, and that the complainant did not seek administrative review in respect of any of the claims disallowed.

11. The complainant contends first that the WHO was guilty of a gross impropriety and a grave injustice in terminating his insurance cover while simultaneously continuing his membership of the Staff Health Insurance scheme by collecting monthly contributions from him; that the Administration blatantly violated Rules 562 and 564 of the Staff Health Insurance (in that it was only the Director-General who could have decided on suspension or exclusion from the benefits of membership in the health scheme), and Manual paragraphs II.9.490 and IV.1.310-345 (in that disciplinary proceedings not required under the Insurance Rules were instigated); that it acted as an authority parallel to the Regional Surveillance Committee; and that even the Director-General did not have the power to impose two punishments (i.e. instituting disciplinary proceedings and stopping his health insurance cover).

12. A fraud or an attempted fraud in respect of the funds of the insurance scheme gives rise to two distinct issues: continued participation in the scheme, and the imposition of disciplinary measures on the guilty staff member. The Tribunal held in Judgment 1856 (under 17) that Staff Health Insurance Rules 560, 562 and 564 and Manual paragraphs IV.1.310-345 recognise the right of the Administration to take disciplinary proceedings in respect of allegations of fraud or attempted fraud.

13. The complainant's insurance cover was not stopped or suspended. The question of whether his claim for 2,662 dollars was genuine had necessarily to be resolved before it was settled; withholding payment pending investigation was therefore quite proper. Further, if that claim was found to be fraudulent, the question would then have arisen as to whether the Director-General should order the complainant's suspension or exclusion from the benefits to which members are usually entitled; and such an order might have become ineffective if in the meantime the Administration had settled all subsequent claims. Withholding settlement of subsequent claims,

even though genuine, was thus a justifiable and prudent measure to preserve the *status quo*; it was not a punishment. The fact that subsequently, in pursuance of the decision of the Regional Surveillance Committee, apart from the disputed claim of 2,662 dollars, all the other duly established claims were paid, demonstrates that the complainant's insurance cover continued, and that the collection of monthly contributions was proper. It also confirms that the Administration did not usurp the functions of the Director-General in regard to suspension or stoppage of cover.

14. The Tribunal holds that the complainant's first set of contentions is devoid of merit.

15. The complainant further submits that the WHO violated the Staff Rules by failing to (a) notify him of any charge, (b) establish any charge, and (c) define what misconduct he had committed. Those are matters relevant only to his dismissal and have been dealt with in Judgment 1856.

16. The complainant goes on to allege incomplete consideration of the facts, but that plea cannot be entertained as he gives no particulars.

17. Finally, in his rejoinder the complainant, for the first time, seeks to question the disallowing of some of his requests for reimbursement. The Tribunal rejects this claim as being irreceivable for failure to exhaust the internal remedies.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

In re Ochani (No. 4)

Judgment 1858

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr Parmanand Sachanand Ochani against the World Health Organization (WHO) on 19 May 1998, the WHO's reply of 31 July, the complainant's rejoinder of 12 August and the Organization's surrejoinder of 13 November 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The background to this case is set out in Judgments 1856 and 1857 also delivered this day on Mr Ochani's second and third complaints.

The complainant was on sick leave from 9 April 1996. The Regional Personnel Officer arranged for a driver to deliver a letter marked "confidential" to the complainant at his home in the early evening. The letter summarised a meeting he had attended with the Personnel Officer on the preceding day. It asked him to provide a written explanation of a discrepancy of 1,800 United States dollars between figures on two receipts that he had submitted in support of a claim dated 29 December 1995 for reimbursement by the Staff Health Insurance scheme of his son's dental treatment in the United States. As instructed in the letter, he signed an enclosed copy to acknowledge receipt and handed it back to the driver.

After his return from sick leave on 27 May 1996 he became aware that the contents of the letter were common knowledge. On 12 June he addressed a letter to the Regional Personnel Officer protesting that the "sanctity of confidentiality" had been lost in the method of delivery of the letter resulting in defamation and he asked for compensation of 500,000 dollars within sixty days.

The Organization did not respond to that demand, but after a lengthy exchange of correspondence with the complainant he was dismissed for misconduct by a letter of 31 July 1996, with effect from 5 August 1996.

He filed an appeal challenging the breach of confidentiality on 30 September with the regional Board of Appeal and subsequently with the headquarters Board of Appeal. In its report of 3 February 1998 that Board recommended rejecting his appeal. The Director-General did so by a letter of 5 March 1998, which the complainant impugns.

B. The complainant contends that it was indiscreet of the Administration to ask him to hand over the signed copy of the confidential letter of 9 April 1996 to the driver who delivered it and who understood English. The driver had been given an "open" letter addressed to the complainant indicating that he should hand the signed copy of the confidential letter back to the driver. There was no justification for sending an "open communication" to his home, at "odd hours" while he was on sick leave. It was a consequence of the Regional Personnel Officer's "personal animosity" towards him.

He gives other instances of "malicious actions" against him: (1) he was physically assaulted in the Personnel Unit on 28 April 1993; (2) surveillance was set up through the colleague who shared his office; (3) he was bypassed for promotion; (4) he suffered harassment while on sick leave in April and May 1996; (5) disciplinary proceedings were initiated against him in the context of the allegedly false health insurance claims; (6) on 3 March 1997, long after his dismissal, he was "subjected to physical violence" on SEARO premises and his glasses were broken. Therefore, to partly offset his losses and "in keeping with the principles of natural justice" he seeks 500,000 dollars for defamation and "mental, material and social injury", and costs of 10,000 dollars.

C. In its reply the Organization denies the contention that the communication of 9 April 1996 was an "open letter": it was marked "confidential" and was delivered to the complainant in a sealed envelope. The complainant could have returned the signed copy in a sealed envelope too. It submits it cannot be held responsible for his acts of indiscretion and he affords no evidence of any prejudice it caused him.

The complainant's allegation of harassment during his seven-week sick leave is new and unsubstantiated. The Organization took no action to pursue its request for further explanations from him during that time, and extended the deadline for his response.

The nature of the complaint being "frivolous" it asks for nominal costs.

D. In his rejoinder the complainant objects to the Organization's transferring its "fault" to him. It should not be ignored that he was on sick leave on the day the letter was delivered and had no material for sealing letters; besides which the contents of the confidential letter had already been made known to the messenger.

He presses his claim to damages and additionally asks for "any further relief that the Tribunal may deem fit".

E. In its surrejoinder the WHO presses the arguments put forward in its reply. It insists that there was no breach of confidentiality in the way the letter of 9 April 1996 was delivered to the complainant. It produces the duplicate which the complainant signed to acknowledge receipt, and a copy of the sealed envelope it was delivered in. The envelope carried the typed instruction: "Please acknowledge receipt of this memorandum by signing the duplicate copy enclosed". It is thereby clear that the acknowledgement copy also went in the envelope. To preserve its confidentiality he should have returned the letter in a sealed envelope, and he alone is responsible if he did not do so.

CONSIDERATIONS

1. The complainant was employed by the WHO at its Regional Office for South East-Asia (SEARO) in New Delhi as from 1988. He was dismissed because he had failed to furnish a satisfactory explanation for

submitting two altered receipts in support of a claim for reimbursement of expenses incurred for dental services provided for his son in the United States.

2. A letter dated 9 April 1996, calling for the complainant's written explanation of the alterations and discrepancies in that claim, was delivered through a staff driver to him at his home because he was on sick leave. In that letter he was requested to acknowledge receipt "by signing the duplicate copy enclosed herewith".

3. The complainant signed the copy and gave it to the driver without enclosing it in a sealed envelope.

4. By letter dated 12 June the complainant claimed that the confidentiality of that letter had been breached, resulting in grave injury to his reputation, because: "a photocopy of the confidential letter, on which [his] signature was obtained in acknowledgement of receipt ... was to be handed over to the English-knowing staff car driver ... which [he] did as per instructions written ... on the covering letter".

5. Having received no reply, the complainant appealed to the regional Board of Appeal on 30 September 1996. There was undue delay by the regional Board in dealing with that appeal, and at the complainant's request the headquarters Board of Appeal decided on 17 June 1997 to allow him to appeal directly to it. The headquarters Board in its report of 3 February 1998, concluded that the delivery procedure was correct and did not constitute a breach of confidentiality: the complainant had been free to return the acknowledgement copy in a confidential manner but he chose not to do so. It recommended dismissal of the appeal. On 5 March 1998 the Director-General accepted that recommendation. The complainant asks the Tribunal to award him damages for defamation in a sum of 500,000 dollars.

6. Even in his complaint to the Tribunal, the complainant did not depart from the position that the acknowledgement copy was enclosed with the letter of 9 April. He added that the Administration had given the driver "an open letter addressed to [him] stating that the signed copy of the confidential letter may be handed over to the driver". However, in his

rejoinder he claimed that the WHO flouted the rule of confidentiality "by supplying a copy of a confidential letter to an English-knowing messenger for getting [his] acknowledgement thereon".

7. With its surrejoinder, the WHO produced the covering letter which had been issued to the driver. It merely stated, "Please acknowledge receipt of this memorandum by signing the duplicate copy enclosed".

8. The Tribunal agrees with the headquarters Board of Appeal that any breach of confidentiality and resulting injury to the complainant occurred solely because of his own failure to enclose the acknowledgement copy in a sealed envelope.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll
MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative

EIGHTY-SEVENTH SESSION

***In re* Munshi**

Judgment 1859

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Mohomed Nazir Munshi against the World Health Organization (WHO) on 22 June 1998 and corrected on 12 October 1998, the WHO's reply of 18 January 1999, the complainant's rejoinder of 11 February and the Organization's surrejoinder of 3 March 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is a national of Malawi and was born in 1946, joined the staff of the WHO in 1990 as a technical officer at grade P.3. He was assigned to a project post in Lesotho in the framework of the Global Programme on Aids (GPA). His contract, of an initial duration of two years, was renewed for two further years and then for fifteen months. In August 1995, the Administration informed him, as well as other staff members, that the funding for his post would expire on 31 December 1995 and that his appointment would end on the same date.

In a letter dated 14 December 1995, an Assistant Director-General informed the president of the Staff Committee that staff members of the GPA who challenged the termination or non-renewal of their appointments could appeal directly to the Tribunal or apply to intervene in complaints already filed. He also undertook that the rulings of the Tribunal in respect of one staff member would apply to other staff members in the same situation in fact and in law.

On 10 July 1997, the Tribunal delivered Judgments 1624 to 1631 (*in re* Clements, Gray, Lewis, Ratcliffe, Sato, Schopper, Stoneburner and Wabitsch) in which it upheld the claims of former staff members of the GPA and ordered the Organization to apply the reduction-in-force procedure to them.

In a letter dated 20 October 1997, the Director of the Division of Personnel informed the complainant that, if he considered that he was in the same situation as those staff members, he could make a written claim to obtain the remedy contained in these judgments. The complainant filed his claim on 21 November 1997. In a letter of 19 January 1998, the Director of Personnel replied that Judgments 1624 to 1631 were not applicable to him as he was not in the same factual and legal situation as the complainants in those cases, since the post he occupied was a field project post and, as such, of limited duration. In a letter dated 19 March, the complainant requested the Director to reconsider his decision to exclude him from the reduction-in-force procedure. By a letter of 6 April 1998, the Director confirmed the decision of 19 January 1998. The complainant challenges this confirmation.

On 28 January 1999, the Tribunal delivered Judgments 1792 (*in re* Najjar and Voetsch) and 1793 (*in re* Aye Han and Renas) dismissing the applications made by other former staff members of the GPA who claimed the redress granted in Judgments 1624 to 1631.

B. The complainant challenges his exclusion from the reduction-in-force procedure on the grounds that he was assigned to a project. He contends that, after five years of service, his post should have been classified as indefinite. He emphasises that the Organization made no attempt to reinstate him.

The complainant asks the Tribunal to grant him the benefit of a reduction-in-force procedure and/or to order his reinstatement. He also asks for damages for the "trauma" experienced by himself and his family, as well as 5,000 United States dollars to reimburse the medical costs incurred as a result of his son's illness.

C. In its reply, the Organization notes that it was the letter of 14 December 1995 which entitled the complainant to file a complaint, and not the letter of 20 October 1997, which only referred to the former letter. However, it does not contest the receivability of the complaint.

According to the Organization, the only issue to be addressed is whether it was correct in concluding that the commitment made in the letter of 14 December 1995 did not apply to the complainant. In other words, the examination of the complaint should be limited to determining whether or not the complainant was in the same legal and factual situation as the staff members of the GPA whose claims were upheld by the Tribunal. While the latter occupied permanent posts at headquarters, governed by the WHO Manual section III.3, the complainant was assigned to a project post, which is a category of posts that Manual paragraph II.9.260.3 classifies as being of limited duration. The fact that he worked for the WHO for five years does not mean that his post was an indefinite one.

It states that it "made all possible efforts" to reassign or reinstate the complainant.

D. In his rejoinder, the complainant refutes the Organization's explanations. He contends that he was a fully fledged member of the staff engaged in Geneva and observes that his contract did not specify that it was tied to the duration of the project.

He adds that, if the letter of 14 December 1995 had been sent to him, he could have filed the claim that it recommended.

E. In its surrejoinder, the Organization contends that in Judgments 1792 and 1793 the Tribunal confirmed that project posts were of limited duration.

CONSIDERATIONS

1. The complainant seeks the quashing of a decision of 6 April 1998, by which the Director of the Division of Personnel of the WHO confirmed the decision in his letter of 19 January 1998 to reject the request that he should benefit from the Tribunal's judgments of 10 July 1997, which allowed the claims of several officials of the Organization who had been assigned to the Global Programme on Aids (GPA) and whose appointments

had ended on 31 December 1995. As recalled in Judgment 1793 (*in re* Aye Han and Renas), the Organization informed all former GPA staff members in a letter of 20 October 1997 that, if they considered that they were in the same situation as a complainant whose claim had been allowed by the Tribunal, they remained free "to make a written claim" to the Director of the Division of Personnel "stating the full particulars of [their] claim, including its factual basis, and the remedy requested".

2. The complainant was assigned to the GPA as a technical officer at grade P.3 on a project post in Lesotho with the number 3.3727 4. Appointed on 1 October 1990 for two years, his contract was renewed twice, the last time until 31 December 1995. In August 1995, he was informed that the funding for his post would expire on 31 December 1995; as a consequence, his contract was not renewed beyond that date. When he became aware of the above judgments of 10 July 1997 and the Organization's letter of 20 October 1997, he sent a letter by facsimile on 21 November to the Director of Personnel stating that he was in the same situation as the officials for whom the cancellation of their posts had been judged unlawful and requesting reinstatement. This claim was rejected by the letter of 19 January 1998, which was confirmed by the impugned decision.

3. The written submissions show that the post occupied by the complainant was created in the framework of a project in Lesotho with the reference GPA/Lesotho/210, and then 200. It is not contested that the functions undertaken by the complainant in the context of the project were not renewed beyond 31 December 1995. As in Judgments 1792 (*in re* Najjar and Voetsch) and 1793, the Tribunal finds that the complainant was recruited on a post under a country project which is not governed by the same rules as those applying to posts created at headquarters and that the duration of the post was linked to the activities of the above project. The situation of the complainant was therefore different to that of WHO staff members recruited by headquarters, who were entitled to benefit from the so-called reduction-in-force procedure.

4. To avoid this conclusion, the complainant contends that his contract did not specify that it was tied to the duration of the project, that he was not informed of his rights in due time, that the Organization did not act

in his regard with the sincerity and fairness that it should have shown him and that the Tribunal should consider his claim equitably. But, on the one hand, he admits having received the letter of 20 October 1997 from the Director of Personnel informing staff members of the Organization of the possibility which was made available to them, despite the expiry of the time limits, to benefit from the Tribunal's case law if they were in the same situation as those whose claims had been allowed. On the other hand, there is no reason to question the action taken by the Organization in his regard. The Tribunal can only conclude that his situation in law and in fact is different from that of the GPA staff members whose claims it allowed in its judgments of 10 July 1997. The complainant cannot therefore claim reinstatement or the benefit of the reduction-in-force procedure.

His claims for the decision to be set aside must therefore be dismissed, as are those for damages and the reimbursement of the medical costs incurred by the illness of his son.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SEVENTH SESSION

In re Gupta (No. 5) **Judgment 1860**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr Shiv Raj Gupta against the World Health Organization (WHO) on 3 June 1998, the WHO's reply of 9 September, including comments invited by the Tribunal from Mr Deepak Chopra, the complainant's rejoinder of 16 November 1998 and the Organization's surrejoinder of 16 February 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career in the WHO is described in Judgment 1473, dated 1 February 1996, on his first complaint. At the material time his grade was ND.4.

On 28 May 1996 the Administration of the Regional Office for South-East Asia (SEARO) in New Delhi issued a vacancy notice, with the reference SEAR 96/17, for a post of assistant I at grade ND.5 in the Fellowships Unit. The number of the post was 5.0047. The complainant applied for the post on 13 June. Following an interview with the Fellowships Officer, responsible for the Unit, he was included on the short list.

On 13 September, the Ad Hoc Selection Committee decided to hold a test for the eligible candidates to evaluate their computer skills. On 25 September, the complainant wrote a letter to the Regional Director asking him to take action against the decision. The Regional Personnel Officer sent him two communications dated 7 October. In the first he informed him that the holding of the test was in conformity with the vacancy notice and was designed to ensure that the best qualified candidate was selected; in the second he invited him to sit the test. The complainant did not take it.

In a letter of 30 October, the Personnel Officer informed the complainant that he had not been selected. On 6 December 1996, he appealed against the decision to the regional Board of Appeal. When the Board did not reply within three months, the complainant appealed to the headquarters Board of Appeal on 21 July 1997, in accordance with Staff Rule 1230.8.2(2). The regional Board of Appeal transmitted its report to the Regional Director on 20 August and recommended him to dismiss the complainant's appeal, which he did on 19 September 1997. On 13 February 1998, the headquarters Board of Appeal also recommended the dismissal of the complainant's appeal. By a letter of 27 March 1998, which is the impugned decision, the Director-General accepted this recommendation.

B. The complainant alleges that the selection procedure was contrived and that the selected candidate had been chosen beforehand by the Fellowships Officer, responsible for the Fellowships Unit. He cites in support a memorandum from the above official, dated 25 February 1997, in which he explained that the selection criteria for the post were not the same as in the past and that the person selected had to be well-versed in computer skills. In the view of the complainant, he gave priority to these skills to the detriment of other qualifications and influenced the deliberations of the Selection Committee. Despite the fact that adequate information was already available to him, the Fellowships Officer interviewed the candidates. He thereby transformed an objective exercise into an "arbitrary choice".

The complainant submits that only two of the candidates on the short list, namely Mr Chopra and Mr J.M. Mago, attended the computer tests required by the Selection Committee. Both of these candidates were selected, the first for post No. 5.0047, and the second for another post of assistant in the Fellowships Unit, namely post No. 5.1320, for which the vacancy notice was published a few months later.

He contends that there was breach of the applicable rules and procedures. In support, he cites a memorandum by the Administration, dated 17 June 1994, which states that tests are conducted for certain posts with specific requirements for applicants at entry level. Post No. 5.0047 was not within the above category of posts, particularly since computer skills were not an essential requirement of the job. He emphasises that no test was held for this type of post either before or after the test which he did not attend, except for post No. 5.1320.

The complainant says that footnote No. 6 to vacancy notice 96/17, which states that a test may be held for the post, cannot justify the holding of the test, since the footnote appears in all vacancy notices and is never put into effect. He adds that the Administration breached a rule of general law when it changed the chairperson of the Selection Committee while the selection process was under way.

The complainant asks the Tribunal to order the quashing of the selection process and of the appointment of Mr Chopra, the holding of a fresh selection process in accordance with the applicable rules and procedures, and to grant him 10,000 United States dollars as compensation for the moral injury suffered, as well as costs.

C. In its reply, the Organization explains that it was not for the complainant to decide whether or not the specific job required computer skills, but for the official responsible for the Unit which put the vacancy up for competition. In the material case, computer skills were essential.

The Administration had to organise interviews for the candidates in accordance with the WHO Manual and the memorandum of 17 June 1994.

In his letter dated 25 September 1996 to the Regional Director, the complainant implicitly recognised that he did not possess the skills required for post No. 5.0047. The candidate who was appointed, Mr Chopra, attended the test and, having obtained the highest score, was selected. The Organization submits that, under the terms of the memorandum of 17 June 1994, nothing prevented the objective verification of the skills of the serving staff who apply for a specific post through the holding of a test.

It observes that the complainant offers no proof of the preselection of Mr Chopra. The Selection Committee was not influenced by the Fellowships

Officer, since it decided to hold a test rather than to base its decision on the short list prepared by the above official. The process was carried out in compliance with the rules. The complainant was not selected, not as a result of bias against him, but because he did not meet the requirements of the post.

It refutes the allegation that it changed the chairperson of the Selection Committee while the process was underway. It merely appointed an alternate member to replace the titular member who was unable to attend a meeting in October 1996, in order not to delay further the selection process. The Manual does not state that the membership of a Selection Committee cannot be modified in the case of necessity.

In his comments dated 8 September 1998, Mr Chopra confirms that he attended the test along with other candidates.

D. In his rejoinder, the complainant emphasises that it was the Selection Committee which decided that computer skills were essential, whereas such a decision was the prerogative of the Administration. The Administration made the test central to the selection process when, in accordance with the memorandum of 17 June 1994, it should also have examined the other skills of the candidates. He did not take the test because it was illegal. He reiterates that these skills were not "essential", but only "desirable".

He contends that the procedure followed by the regional Board of Appeal was flawed, since its chairman was changed during the process.

E. In its surrejoinder, the Organization presses its arguments. It explains that computer skills were indeed essential, while skills which were merely desirable were described as such in the vacancy notice. It adds that computer skills were not the only criterion and that it considered the other qualifications of the candidates.

The complainant had been informed by a circular that the chairman of the regional Board of Appeal had been appointed for one year. At the time, he did not challenge the composition of the Board.

Finally, it states that it has never maintained it is necessary to conduct a test to fill all vacancies, but that the decision is taken on a case by case basis.

CONSIDERATIONS

1. The complainant joined the Regional Office for South-East Asia (SEARO) of the World Health Organization in New Delhi on 12 July 1979 as a clerk-typist at grade ND.3. Following several appointments within SEARO, he was reassigned on 1 July 1992 to the Budget and Finance Unit and promoted to grade ND.4. On 1 January 1994, he was awarded a career service appointment with retroactive effect from 1 July 1993.

2. On 28 May 1996, SEARO issued a vacancy notice - SEAR 96/17 - for a post of assistant I at grade ND.5, with the number 5.0047. On 13 June 1996, the complainant applied for the post and, on 30 October, he was informed that he had not been selected.

3. The complainant lodged an internal appeal against this decision with the regional Board of Appeal. On 27 March 1998, the Director-General of the WHO definitively dismissed the appeal brought by the complainant, who filed his complaint with the Tribunal.

The complainant seeks the quashing of the selection process and of the appointment of the selected candidate, a fresh selection process in accordance with the prescribed procedures, the payment of 10,000 United States dollars as compensation for the moral injury suffered, and costs.

4. The material case concerns the lawfulness of an appointment to a post covered by a vacancy notice and of a process for the selection of candidates. The Tribunal considers it necessary to specify the scope of its power of review. As it has emphasised on many occasions, the decision of an international organisation in respect of an appointment is at its discretion and is therefore subject to only limited review. The Tribunal will therefore exercise the greatest care in reviewing an appointment, since it may not replace the organisation in deciding on the respective merits of the various candidates.

5. In challenging the legality of the impugned decision, the complainant has five pleas, which the Tribunal will examine below.

(a) In the first place, the complainant submits that the whole selection process was tainted with bias. He accuses the Fellowships Officer who was responsible for organising the competition, of stage-managing it, and influencing the members of the Ad Hoc Selection Committee so that the candidate who was selected to the vacant post would be one of his choice and who only had good computer skills to the exclusion of clerical skills. He cites as proof a memorandum of 25 February 1997, in which the Fellowships Officer states what skills the candidate appointed as assistant should have.

Even though this memorandum contains the opinion of a staff member of SEARO, it cannot be deduced from the text that it is designed to exert pressure on the members of the Selection Committee. The complainant has not provided any proof to demonstrate the partiality of the Fellowships Officer or the alleged influence exerted on the members of the Selection Committee. Since the complainant has not proven his allegations, this plea must fail.

(b) Secondly, the complainant submits that the interviews held by the Organization should not have been part of the selection process. The Tribunal finds that the complainant's arguments lack coherence. On the one hand, he refers to Manual paragraph II.3.430, under which the responsible officer must interview the candidates. On the other hand, he claims that in the material case interviews were neither essential, nor relevant, since the candidates were already staff members of SEARO and therefore known to the Selection Committee. The complainant alleges that holding interviews changed an objective selection exercise into a subjective and arbitrary choice.

The Tribunal observes that in accordance with the Manual the selection process had to include interviews with the candidates. The fulfilment of this duty by the Organization cannot be held against it as grounds for setting aside its decision.

(c) Thirdly, the complainant also contests the legality of the selection process and alleges that the holding of the computer test was not normal practice. On 13 September 1996, the Selection Committee unanimously decided to invite all candidates to take a computer skills test on 10 October 1996. The complainant protested against that decision in a memorandum of 25 September 1996 addressed to the Regional Director of SEARO. He stated that he had been working on a word processing programme for several years and it would be unfair to ask him to take a database test. In his rejoinder, he explains that he did not take the test as it was "illegal" and "unauthorised". The complainant endeavours to demonstrate that computer skills were not essential for the post which had been put up for competition and that the test was contrary to the practice of the Organization. He recognises that the vacancy notice explicitly referred to the possibility of holding a test, but contends that the vacancy notice form is used for all competitions. He presses his claims that the selection process was tainted with bias and adds that the holding of the test was merely a formality intended to justify the appointment of an applicant pre-chosen by the Fellowships Officer.

The Tribunal cannot accept the complainant's arguments as to whether or not computer skills are necessary for the post in question. This is a matter which is at the discretion of the Organization. The Tribunal confines itself to noting that in the vacancy notice it was explicitly stated that candidates might be invited to take a test. Furthermore, the complainant has not identified the rules which he alleges that the Organization breached in deciding to hold a test. For these reasons, the plea fails.

(d) Fourthly, the complainant advances a plea based on the existence of a memorandum of the Regional Director of SEARO, dated 17 June 1994, on staff selection and recruitment procedures, from which he quotes the following passage:

> "Tests are conducted for certain posts with specific requirements, viz. editor, equipment operator including computer personnel, clerk-typists and secretaries at entry level."

The complainant deduces from this text that no internal candidate was obliged to take the test held by the Organization. He is mistaken. In the first place, the term "viz." implies that an enumeration offering examples by way of illustration will follow. In the second place, the memorandum is of a general nature and is not incompatible with the specific requirements set out in the vacancy notice, which explicitly states that candidates may have to undergo a test in computer skills. The specific requirements established in the vacancy notice prevail over the general provisions in the memorandum.

(e) The fifth and final plea is based on the fact that the composition of the Selection Committee is alleged to have changed during the competition. This argument must fail, since the written submissions show that, due to the absence of a titular member, it was necessary to replace her with an alternate member.

6. For the reasons set out above, the Tribunal finds that the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SEVENTH SESSION

***In re* Gupta (No. 6)**

Judgment 1861

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr Shiv Raj Gupta against the World Health Organization (WHO) on 7 September 1998, the WHO's reply of 16 December 1998, including comments invited by the Tribunal from Mr J.M. Mago, the complainant's rejoinder of 17 March 1999 and the Organization's surrejoinder of 30 April 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career in the WHO is described in Judgment 1473, dated 1 February 1996, on his first complaint. At the material time his grade was ND.4.

On 7 November 1996, the Administration of the Regional Office for South-East Asia (SEARO) in New Delhi issued a vacancy notice, with the reference SEAR 96/29, for a post of assistant I at grade ND.5 in the Fellowships Unit. The number of the post was 5.1320. The complainant applied for the post on 21 November 1996.

On 9 January 1997, the Ad Hoc Selection Committee examined a first short list of applicants prepared by the Fellowships Officer, responsible for the Fellowships Unit, and requested him to submit a second short list. On 25 February, the Selection Committee decided to hold a test for the candidates included by the above official in the second short list of 13 February, in order to assess their computer skills. By a memorandum of 6 March, the Regional Personnel Officer invited the persons concerned to take the test on 12 March. On 10 March, the complainant sent a memorandum to the Regional Director requesting him to take action against this decision. The Personnel Officer replied in a letter of 11 March that the holding of the test was in conformity with the procedure required by the vacancy notice. The complainant did not take the test.

By a letter of 2 April, the Administration informed the complainant that he had not been selected. On 28 May, he lodged an appeal against this decision with the regional Board of Appeal. The Board issued its report on 8 September. It recommended the Regional Director to dismiss the complainant's appeal, which he did in a letter dated 23 September. The complainant lodged an appeal with the headquarters Board of Appeal on 10 November 1997. On 5 May 1998, the Board transmitted its report to the Director-General and recommended him to dismiss the complainant's appeal. By a letter of 5 June 1998, which is the impugned decision, the Director-General accepted this recommendation.

B. The complainant contends that the official responsible for the Fellowships Unit, the Fellowships Officer, favoured the candidate who was selected, namely Mr Mago. He cites a memorandum from the official responsible, dated 25 February 1997, in which he explained that the selection criteria for the post of assistant were not the same as in the past and that the person selected would have to be well-versed in computer skills. Similarly, he says that the remarks made by the Fellowships Officer concerning the complainant's interview show that official's bias against him.

The complainant also pleads that the selection and recruitment procedures established in a memorandum by the Administration dated 17 June 1994 were breached. The memorandum states that tests are conducted for entry level candidates for certain posts with specific requirements. The complainant deduces therefrom that no test can be held in the case of the promotion of existing staff members. Moreover, he claims that the post put up for competition did not meet the requirements thus described, particularly since computer skills were not essential, but merely desirable. In addition, the Administration made the test central to the selection process when, in accordance with the above memorandum, it should also have considered the other skills of the candidates.

In the view of the complainant, footnote No. 6 to vacancy notice 96/29, which states that a test may be held for the post, cannot be used to justify the holding of the test, since the footnote appears in all vacancy notices and is never put into effect. In the material case, the test was held to facilitate the selection of the candidate chosen previously by the Fellowships Officer.

He adds that that official influenced the Selection Committee and that no test was held for this type of post either before or after the test which he did not attend, with the exception of post No. 5.0047, held by Mr Deepak Chopra.

The complainant asks the Tribunal to order the quashing of the selection process and of the appointment of Mr Mago, the holding of a fresh selection process in accordance with the existing policy and prescribed procedures, and to grant him 10,000 United States dollars as compensation for the moral injury suffered, as well as costs.

C. In its reply, the Organization submits that the complainant offers not a shred of evidence that the Fellowships Officer was predisposed to have Mr Mago appointed. The latter was selected because he was the most suitable candidate for the post which had been put up for competition. Computer skills were an essential requirement of the post. Since the complainant did not have the required skills, it was logical that he was not selected, although the Organization had nevertheless considered his other qualifications.

The Organization explains that the comments made by the Fellowships Officer in relation to the interview are not evidence of his prejudice, but demonstrate his objective assessment of the complainant's candidacy.

It was not for the complainant to decide whether or not the duties of the post required computer skills, but for the official responsible for the Unit which had put the post up for competition.

Under the terms of the memorandum of 17 June 1994, nothing prevents the Administration from holding a test to "verify objectively" the skills of the candidates. The Organization observes that posts Nos. 5.0047 and 5.1320 are of a specific nature and there have been no competitions for similar posts since.

In his comments attached to the reply, Mr Mago states that he possesses higher qualifications than the complainant and that, by not appearing for the test, the latter had clearly shown his inferior feelings. He explains that knowledge of computers is essential for the functions of the post.

D. In his rejoinder, the complainant says that the Fellowships Officer should only have submitted one short list.

He considers that the comments made by Mr Mago require no comment, since they merely reiterate the views of the Administration.

He submits that the position of the Administration is contradictory, since it states first that only candidates who take the test successfully would be considered, then that all the selection criteria for all candidates were taken into consideration before any decision was taken.

He says that the duties of a post have to be determined by the Regional Director, and not by the officer responsible for putting the post up for competition.

He reiterates his arguments concerning the selection procedure and affirms that the memorandum of 17 June 1994 is a comprehensive and exclusive policy statement which does not admit further interpretation.

E. In its surrejoinder, the Organization reaffirms that it followed the selection procedure. It explains that the holding of a test and the consideration of the other skills of the candidates are not contradictory and that the applicable rules do not limit the number of short lists.

CONSIDERATIONS

1. The complainant joined the Regional Office for South-East Asia (SEARO) of the World Health Organization in New Delhi on 12 July 1979 as a clerk-typist at grade ND.3. Following several appointments within SEARO, he was reassigned on 1 July 1992 to the Budget and Finance Unit and promoted to grade ND.4. On 1 January 1994, he was awarded a career service appointment with retroactive effect from 1 July 1993.

2. On 7 November 1996, SEARO issued a vacancy notice – SEAR 96/29 – for a post of assistant I at grade ND.5, with the number 5.1320, in the Fellowships Unit. On 21 November 1996, the complainant applied for the post and, by a letter of 2 April 1997, the Organization informed him that he had not been selected.

3. The complainant lodged an internal appeal against this decision. After the appropriate procedures had been followed, the Director-General of the WHO finally rejected the complainant's appeal by his decision of 5 June 1998. The complainant then filed his complaint with the Tribunal.

The complainant seeks the quashing of the selection process and of the appointment of the selected candidate, a fresh selection process in accordance with the prescribed procedures, the payment of 10,000 United States dollars as compensation for the moral injury suffered, and costs.

4. The complainant contends that the Organization repeated in respect of this competition the same illegalities and arbitrariness which he had already challenged in his fifth complaint which the Tribunal rules on in Judgment 1860 also delivered this day.

In asking for the impugned decision to be set aside, the complainant has two pleas, namely: (a) the prejudice of the Organization towards him; and (b) the breach of the selection and recruitment procedures by the Organization.

(a) *The prejudice of the Organization in respect of the complainant*

The complainant reiterates the arguments made in his fifth complaint and refers to the memorandum of 25 February 1997 which mentioned that computer skills would be necessary for the post of assistant. He alleges bias by the Fellowships Officer, responsible for the Fellowships Unit where the vacant post was. This predisposition, in the view of the complainant, is due to the official's "enchantment with computer operations" and the fact that he had "no eyes or ears for anything else". With regard to the complainant's allegations and the above memorandum, the Tribunal refers to 5 of Judgment 1860.

The only new element in this case consists of the report of the regional Board of Appeal, which recommended the dismissal of the appeal by two votes to one. The member of the Board who voted in favour of the appeal, referred to a form completed by the Fellowships Unit which contained the comment that the complainant was "very arrogant and not very popular" and mentioned the sick leave which he had taken. Even if they are correct, these facts are not grounds for considering that the selection procedure was tainted with partiality.

(b) *Breach of the selection and recruitment procedures*

The complainant reiterates his pleas concerning the irregularity of holding interviews with candidates and in relation to the computer test. In this regard too, the Tribunal refers to 5 of Judgment 1860.

5. For these reasons, the complaint must fail.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SEVENTH SESSION

In re Ansorge (No. 2) — Judgment 1862

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Wolfgang Richard Ansorge against the European Southern Observatory (ESO) on 23 December 1997 and corrected on 1 April 1998, the ESO's reply of 21 July, the complainant's rejoinder of 9 September and the Observatory's surrejoinder of 16 November 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Some facts that are relevant to the present case are set out under A in Judgment 1739 on Mr Ansorge's first complaint.

By a memorandum dated 3 April 1997, the Director General informed the staff of ESO that the head of Administration would be taking over as safety manager, with immediate effect, and would replace the complainant. By a letter of 23 April 1997, the complainant appealed to the Director General against that decision asserting that he had not been informed of the reasons for it. He asked him to withdraw it, or if this was not possible, to authorise him to appeal directly to the Tribunal. He also complained that he had not been informed of the decision until after it had been made known to all the staff. That same day the complainant received a letter from the head of the Personnel Department confirming the decision.

By a letter dated 28 April, the head of Administration, after indicating that the complainant had indeed been informed of the decision before the staff as a whole, requested that he withdraw his appeal. The complainant refused to do so in a letter of 17 May.

Having examined the case, the Joint Advisory Appeals Board, in its report to the Director General dated 8 August, "unanimously but somewhat hesitantly" recommended "that the demands made by Mr Wolfgang Ansorge ... not be granted". By a letter of 30 September 1997, which is the impugned decision, the head of Administration informed the complainant that the Director General had decided to maintain his initial decision.

B. The complainant puts forward four pleas. First, he contends that the Observatory's decision is illegal since no reasons were given for it and it is based on manifestly mistaken conclusions. The complainant affirms that he was not informed of the reasons for the decision until the hearing of the Joint Advisory Appeals Board. The Board also noted that he had not been fully and properly informed of the reasons for his replacement. The complainant submits that his services were never evaluated and that he was never informed that he should improve them. He cites also the report of the Board which, in his opinion, is fully convinced that the ESO has not revealed the real reasons for its decision. He claims that the reasons for the decision included his opposition to his first-level supervisor and the Director General over contracts awarded to an Italian company.

Second, the complainant contends that the impugned decision is based on an error of law. He submits that, under the terms of a memorandum of 4 September 1995 concerning the "contract policy for international staff members" of the Observatory, the elements to be taken into account for the award of indefinite contracts are whether there is a long-term need for the post, and whether the staff member has the necessary level of performance, profile and potential. In the present case, the Contract Advisory Committee had considered that the functions of the complainant were of a permanent nature. Moreover, it had neither questioned the quality of his work nor his qualifications for the post that he occupied. By replacing the complainant, the Director General had therefore been in breach of the procedures outlined in the memorandum, and he should have awarded him an indefinite contract.

Third, the complainant contends that the impugned decision is based on misuse of power. He challenges the ESO's argument put forward during the internal procedure, that the decision was in the interests of the service and he cites the opinion of the Joint Advisory Appeals Board, which refers to "manoeuvres" by the ESO and expresses "doubts" concerning the real reasons for the decision. In the complainant's opinion, the real reason for his replacement lies in the Observatory's desire to "be rid" of him, particularly in view of his many disagreements with his first-level supervisor and the Administration on questions of safety. He explains in this respect that such disagreement was inevitable since his work consisted of ensuring that certain standards were adopted and applied, in order to ensure the safety of the infrastructure and officials. He alleges however that neither his supervisor nor the Administration were concerned about the safety of property or persons.

Fourth, he considers that the Observatory harmed his dignity and good name and that it caused him unnecessary and undue injury.

The complainant asks the Tribunal to order the quashing of the Director General's decision of 30 September 1997 and to award him costs.

C. In its reply, the Observatory does not contest the receivability of the complaint, but contends that it is unfounded.

It submits that the complainant was informed at a meeting on 21 January 1997 that the head of Administration would take over his functions relating to the ESO Safety Handbook, and that he did not appeal against that transfer of duties. The decision to replace him, contained in the memorandum of 3 April was confirmed the next day at a meeting that he had with the head of Administration, during which he was informed of the reasons for the decision. Since that memorandum was not distributed until 7 April, the complainant was therefore duly informed before the rest of the staff.

The Observatory emphasises that the decision to relieve the complainant of his duties as safety manager is within the discretion of the Director General. It affirms that, although the lack of satisfaction with the complainant's work was a factor, it was not the decisive factor in the decision. The Observatory did not therefore harm his good name. The technical competence of the complainant was never in question, as witnessed by the award of a salary increase, of which he was informed by a letter from Personnel Services dated 30 January 1997. The Observatory also justifies its decision on the grounds of the changing responsibilities of an ESO safety manager, which henceforth would require a legal background.

Finally, the Observatory contends that there was no misuse of power. It is because the complainant did not have the qualifications and specific experience henceforth required to perform the duties of safety manager that these functions were conferred to another person.

D. In his rejoinder, the complainant observes that a decision which lies within the discretion of the administration must nevertheless be accompanied by reasons and is subject to review by the Tribunal.

With regard to the Observatory's allegation that he did not appeal against the decision of 21 January 1997, the complainant explains that it was impossible for him to do so since the decision was neither written nor official.

He says that it is not true that he lacks a legal background since he had to deal with legal issues "for nearly twenty-five years in functions held before he joined ESO".

He refers again to his dispute with his first-level supervisor and the Director General concerning the award of contracts to an Italian company, and draws the Tribunal's attention to a letter indicating that some contracts with the company had been terminated, and which he produces as evidence that his warnings had been valid.

He reiterates that he should have been awarded an indefinite contract.

E. In its surrejoinder, the Observatory refutes the complainant's claim that he was unable to appeal against the decision of 21 January 1997 to replace him as safety manager because it was not communicated to him in writing. It has no obligation to issue its decisions "in writing only". It contends that the complainant's pleas are not founded on "objective evidence" and that his purpose is the same as in his complaint which resulted in Judgment 1739, namely that he wants the Tribunal to recognise that the Observatory wanted to rid itself of him. The ESO says that it does not understand the relevance to this case of the termination of a contract with a certain company. Finally, it considers that the issue not to award the complainant an indefinite contract has already been examined in Judgment 1739.

CONSIDERATIONS

1. The complainant was engaged by the ESO as product assurance manager for its Very Large Telescope (VLT) project on 1 May 1991 under a three-year fixed-term contract. His contract was renewed on 19 November 1993 for a period of three years expiring on 30 April 1997. On 2 February 1995, the staff of the ESO was informed that the complainant had been made safety manager and would assume, in addition to his specific assignments in relation to the VLT, responsibility for safety and security in Chile and Germany.

On 30 October 1996, the complainant was offered an extension of his contract for a further two years, until 30 April 1999. Considering that he could claim a permanent appointment, he filed a complaint with the Tribunal challenging the Observatory's decision not to award him an indefinite contract. In Judgment 1739, the Tribunal dismissed the complaint.

2. An internal memorandum dated 3 April 1997, signed by the Director General, informed the staff of the ESO of the appointment of the head of Administration who has the overall coordination responsibility for matters of safety, security and environmental protection, as "safety and security manager", with immediate effect, replacing the complainant.

The latter appealed against that decision in a letter addressed to the Director General on 23 April 1997, stating that the reasons for the decision had not been communicated to him and that the way in which the case had been handled by the Observatory had harmed his dignity and good name.

3. On 8 August 1997, the Joint Advisory Appeals Board recommended the dismissal of the complainant's appeal. By a letter of 30 September 1997, he was informed by the head of Administration that the Director General had decided to confirm his initial decision.

4. The complainant asks the Tribunal to order the quashing of the Director General's decision, and to draw all the legal conclusions, since he considers that the Observatory breached its obligation to inform him of the real reasons underlying the impugned decision. In his view, the decision is based on clearly mistaken conclusions drawn from the facts.

The complainant submits that the decision is based on an error of law, that it constitutes misuse of power and that the Observatory was in breach of its obligations to respect his dignity and good name and to avoid causing him unnecessary and undue injury.

5. In the first place, it should be noted that the impugned decision, which consists of a reorganisational measure involving the withdrawal of certain functions, is the kind of decision that the Administration may take within its discretionary authority. Firm precedent has it that such decisions can only be set aside if they are tainted by certain flaws which make them illegal.

The Tribunal will therefore endeavour to determine whether the complainant has adduced proof of the existence of one or more flaws tainting the impugned decision.

6. The complainant contends that the impugned decision was taken without informing him of the real reasons why the Director General reached his decision and that it was based on mistaken conclusions drawn from the case.

7. This plea cannot be allowed. In this case, the reasons for the Director General's decision are to be found in the written submissions, and particularly in the memorandum of 15 January 1997. They were also stated during meetings on 21 January and 4 April 1997 and further developed in the remarks and comments made by the Administration in relation to the complainant's internal appeal. During the appeal procedure, it was indicated that the reasons for the impugned decision were the "increased workload with respect to the appellant's main responsibilities as VLT Product Assurance Manager as well as the intent of the Director General to change the responsibilities for setting up clear, comprehensive and adequate safety

regulations for ESO within a short period of time" and that "taking into account that an essential part of this work [was] related to legal issues, it appeared appropriate to give this task to the Head of Administration".

8. The complainant submits that the real reasons for which the Director General took the impugned decision are not those indicated by the Observatory. The Tribunal notes that the complainant's arguments put forward in this respect, which were also made in the case leading up to Judgment 1739, are pure speculation and are not based on any proof adduced from the written submissions. The document annexed to the complainant's rejoinder, showing that ESO had ended certain contracts, cannot be considered evidence supporting the complainant's allegations.

9. Contrary to the allegations of the complainant, the impugned decision was brought to his knowledge before the staff was informed of it. The Observatory states, without being contradicted, that the memorandum of 3 April 1997 was not distributed to the staff until 7 April 1997 and that, before that date, on 4 April, a meeting was held during which the head of Administration informed the complainant of the Director General's decision. The occurrence of this meeting is not challenged.

10. The complainant submits that the impugned decision is based on an error of law. He contends that the Contract Advisory Committee had considered that his functions as safety manager were of a permanent nature and that it had neither questioned the quality of his work nor his qualifications for the post. He states that the Director General should have taken into consideration his qualifications, as well as the fact that the functions of safety manager responded to the conditions set out in the Observatory's new contract policy, and that he should have awarded him an indefinite contract for these functions. Furthermore, by deciding to withdraw these responsibilities, the Director General committed a procedural flaw. Finally, the Director General broke the promise to re-examine the impact of his functions as safety manager on his contractual situation.

11. In the above plea, the complainant returns to the decision taken by the Observatory not to award him an indefinite contract.

In Judgment 1739, the Tribunal has already ruled on this plea and does not find in the present case any error of law attributable to the Observatory which could taint the impugned decision.

12. The complainant submits that the impugned decision is based on misuse of authority. He says that the interests of the service were not taken into account, but only the desire to be rid of him because, in the context of his functions, he had had many disagreements with Administration.

The Tribunal observes that the complainant's allegations are not based on any evidence adduced from the written submissions.

13. In view of the above, the Tribunal finds that the impugned decision is not tainted by any flaw such as to lead to its quashing and that, in taking such a decision and communicating it as it did to the staff, the Observatory was not in breach of its obligations to respect the dignity and good name of the complainant, or to avoid causing him unnecessary and undue injury.

The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

EIGHTY-SEVENTH SESSION

***In re* Harada** **Judgment 1863**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Catherine Sunan Harada against the Food and Agriculture Organization of the United Nations (FAO) on 4 May 1998 and corrected on 1 July, the FAO's reply of 15 October 1998, the complainant's rejoinder of 5 February 1999 and the Organization's surrejoinder of 20 April 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an American citizen born in 1946, has worked for FAO on several occasions and with various types of employment status since 1981. On 4 June 1991, her short-term contract as audio-typist at grade G.3 in the Translation Service was converted to a fixed-term contract until 31 December 1991. It was subsequently renewed.

On 4 July 1994 she was transferred to the Sales Unit of the Distribution and Sales Section. Her work consisted mainly of processing orders for publications and preparing the corresponding invoices. In a memorandum dated 8 February 1996, she complained to the chief *ad interim* of the Production and Distribution Branch that it was not possible for her to use the computer invoicing programme, which meant that her work was very time-consuming. She therefore requested that her productivity not be compared to that of her colleagues, who had access to the programme. She also observed that she had never officially been transferred to the post that she was occupying. The chief *ad interim* replied on 23 February that the invoicing programme was available on her computer and that she should use it for her work; that her productivity was not compared with that of her colleagues, since the work required to process an order could vary considerably, but that the backlog in processing orders was a matter of concern; and that the Division Director would contact her concerning her post.

By a letter of 28 June 1996, the Director of the Personnel Division informed her that over 200 posts would be abolished. He did not state whether the complainant's post was concerned, but assured her that every effort was being made to identify a suitable post for her.

In accordance with Manual paragraph 308.411, staff members at grades G.1 to G.6 benefit from a salary increment to the next step within the grade every two years if their service is satisfactory. The complainant should normally have received such an increment as from 1 November 1996. In a memorandum of 21 August, the Director of the Information Division communicated to her a memorandum from her supervisor, of the same date, which criticised the backlog of outstanding orders, her difficulties in team-working, her prolonged absences during working hours and her lack of computer skills. The Director informed her that she was recommending that the Director of the Personnel Division withhold the increment until her services were considered satisfactory. The complainant replied in detail to these criticisms by a memorandum of 25 September. On 16 October, the Director of the Information Division informed her that she had maintained her decision and on the same day, she requested the Director of the Personnel Division to withhold the increment.

On 24 October 1996 the Director of the Personnel Division informed the complainant that he had accepted the recommendation to withhold her increment. With reference to that decision and the abolition of her post, he informed her on 5 November that her fixed-term contract which was due to expire on 31 December 1996 would not be renewed.

The complainant appealed to the Director-General against these two decisions on 20 January 1997. On 19 March, she lodged an appeal with the

Appeals Committee. The next day, the Assistant Director-General in charge of Administration and Finance dismissed her first appeal on behalf of the Director-General. In its report of 17 November, the Appeals Committee recommended that the Director-General dismiss her second appeal, which he did by a letter of 3 February 1998. That is the impugned decision.

B. The complainant submits that she had not worked in the post in the Translation Service for over two years and contends that she was deliberately left in a post that was destined to be abolished and that this constituted discrimination. She says that the Director of the Personnel Division showed bad faith in assuring her that every effort would be made to find her another post.

She contends that, in accordance with Manual paragraph 308.416, separation can only be justified where service has been reported as unsatisfactory "for two successive qualifying periods". She says that the Director-General therefore made an error of law by deciding not to renew her contract when her increment had been withheld for one qualifying period only. She adds that the withholding of an increment is normally temporary, thereby allowing the official to improve, but that no such chance was given to her. She considers that she was a victim of personal prejudice and explains that her productivity could not be compared to that of her colleagues because she did not have access to the computer invoicing programme, she had never been asked to work overtime and had been absent on sick leave for long periods without being replaced. She adds that no criticisms had been made of her performance since her transfer to the Sales Unit.

The complainant seeks the quashing of the impugned decision, her reinstatement as of 1 January 1997 and the granting of her within-grade salary increment.

C. In its reply, the Organization states that in 1994 the complainant was transferred together with her post from the Translation Service to the Distribution and Sales Section. It explains that the complainant's post was abolished on 31 July 1996 and that she was placed on a temporary post in the Sales Unit with the same functions that she had been performing since July 1994. The efforts made to find her a suitable post were discontinued when her supervisor considered her work to be unsatisfactory. The decision not to renew her contract was therefore based on her poor performance.

The Organization states that Manual paragraph 308.416 only concerns the within-grade salary increment and that it does not seek to qualify other provisions of the Manual, including those governing the expiration of fixed-term appointments.

D. In her rejoinder, the complainant challenges the allegation made by the Organization that she was transferred with her post to the Distribution and Sales Section. She submits that the letter of the Director of the Personnel Division of 5 November 1996 clearly states that the decision not to renew her appointment was based, not only on the withholding of her within-grade increment, but also on the abolition of her post.

She refutes the Organization's interpretation of Manual paragraph 308.416 and contends that it also applies to staff members holding fixed-term contracts. She adds that the problem of productivity was generalised throughout the Sales Unit due to the poor organisation of work.

The complainant submits that the criticisms made by the Administration served as "pretexts for withholding [her within-grade increment] which in turn was used as an argument for terminating [her] appointment since a post that [she] was not occupying was abolished". Finally, she states that Manual paragraph 314.222 was not respected, because she never received from her Division Director a written statement setting forth the specific reasons for the envisaged action.

E. In its surrejoinder, the Organization submits that the complainant retained her post until it was abolished. It observes that it is not unusual for an official to hold a post while performing tasks that do not correspond to the post description.

The Organization observes that Manual paragraph 314.222 is in the context of termination for unsatisfactory service. However, the complainant's contract came to an end, not because of dismissal, but because her contract expired.

CONSIDERATIONS

1. After working as a typist on various short-term appointments at a daily rate, the complainant was given a short-term (monthly rate) appointment on 4 December 1990 to 3 June 1991 in the Translation Service. On 4 June 1991 her appointment was converted to a fixed-term appointment and extended to 31 December 1991, when it was subsequently renewed.

2. She was transferred on 4 July 1994 to the Sales Unit of the Distribution and Sales Section where she processed orders for publications and prepared invoices.

3. On 8 February 1996 she complained to her supervisor about her duties and in particular about not being allowed to use the computer invoicing programme. He replied on 23 February 1996 that it was available on her computer and she should be using it, since she had received training with her colleagues; and she was advised if there were difficulties to consult her group leader. He said that while her productivity was not being compared numerically to that of her colleagues he was concerned about the level of backlog of orders.

4. On 28 June 1996 the Director of the Personnel Division informed her of the abolition of posts but she was assured that every effort would be made to redeploy her. The Organization states that "she was then placed on a temporary post".

5. In August 1996, the Director of the Information Division told the complainant that she was recommending the withholding of her within-grade salary increment due on 1 November 1996 in view of her unsatisfactory performance over the last two years. Various shortcomings were listed: a backlog of orders, prolonged absences during working hours, difficulties in team-working and a lack of computer skills.

6. The complainant contested the criticisms made against her in a memorandum of 25 September to the Director of the Information Division who met her twice to discuss the matter. The complainant also had the opportunity to discuss the matter with the personnel officer of the

Management Support Unit, the chief of that unit and her supervisor. On 16 October 1996 the Director of the Information Division replied to the points made in the complainant's memorandum and confirmed that she would recommend the withholding of her salary increment to the Director of the Personnel Division.

7. On 24 October the Director of Personnel informed her of his decision to withhold her increment. Subsequently, on 5 November he informed her that her contract, due to expire on 31 December 1996, would not be renewed.

8. The complainant appealed to the Director-General against both decisions and on 20 March 1997 that appeal was dismissed. The previous day, she had appealed to the Appeals Committee. In its report of 17 November 1997 it recommended rejecting her appeal. The Director-General endorsed the opinion of the Committee and on 3 February 1998 dismissed her appeal as unfounded. That is the decision impugned.

9. The relief sought by the complainant is the quashing of the decision of 3 February 1998, her reinstatement as of 1 January 1997 and the granting of her within-grade salary increment.

10. The complainant claims that neither the abolition of her post nor the withholding of her increment were valid reasons for the non-renewal of her contract. She claims she had not worked on the abolished post in the Translation Service for two-and-a-half years; and, she was working on a post in the Sales Unit that was not abolished and that "needed to be filled". She concludes that the Administration showed discrimination against her by leaving her on a post "of no purpose" which was destined to be abolished. The assurance by the Director of the Personnel Division that every effort was being made to identify a suitable post for her could not have been made in good faith because no steps were taken to transfer her to the post whose duties she had been performing. Also, the provisions of the Manual concerning the abolition of posts or the reduction of staff were not applied in her case.

11. She claims that under Manual paragraph 308.416, it is provided that only unsatisfactory service for two successive qualifying periods justifies the "transfer, demotion or separation" of a staff member. She had received salary increments up to the last qualifying period. It was therefore a mistake of law to decide on the non-renewal of her contract after the withholding of her increment for only one period. The withholding of a within-grade salary increment is not a definitive refusal as it can be granted later in cases of improvement.

12. In the complainant's view the withholding of her increment was unjustified. She seeks to refute each point put forward in 1996 by the Director of the Information Division. It was unreasonable to compare her productivity to that of her colleagues who were allowed to use the computer invoicing programme and worked overtime; she was not asked to work overtime and was absent on authorised sick leave for long periods without being replaced. Her work must have been satisfactory, otherwise she would not have been kept on in the Sales Unit for over two-and-a-half years. Further, her supervisors would have asked for her redeployment or, at the very least, have given her warnings and criticised her.

13. The Organization points out that she was separated on the expiration of her fixed-term contract in accordance with Staff Rule 302.907 which provides:

> "A fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment. Separation as a result of the expiration of any such appointment shall not be regarded as a termination of appointment within the meaning of the Staff Regulations and Staff Rules."

The reason for non-renewal was unsatisfactory work performance and this was explained to the complainant who was given an opportunity to reply. Manual paragraph 308.416, which is a sub-paragraph of 308.41 concerning within-grade salary increments in general, does no more than provide a separate basis for transferring, demoting or separating a staff member where there are two successive unsatisfactory reports. It does not affect the power not to renew a contract under Staff Rule 302.907.

14. Regarding the abolition of her post, the FAO states that it was effectively abolished on 31 July 1996. In accordance with the Organization's policy to seek the redeployment of staff, the complainant was placed on a temporary post until 31 December 1996, the date her contract was due to expire. Efforts were being made to identify posts for her but were discontinued after she received an unsatisfactory appraisal of her work performance. The decision was then made not to renew her fixed-term contract.

15. The Tribunal is of the opinion that the non-renewal of the complainant's contract falls within the scope of Staff Rule 302.907 entitled "Expiration of fixed-term appointments". The provisions of Manual paragraph 308.416 which refer to two successive unsatisfactory reports in relation to the granting of increments do not limit the application of Staff Rule 302.907 in its own right. The non-renewal of the complainant's contract was not based on the abolition of her post, therefore the Manual provisions relative to abolition of post or reduction of staff do not apply to her.

16. The complainant's allegation that the abolition of her post was discriminatory is not supported by evidence. Moreover, her contention that the assurances about finding her another post were not made in good faith remains unsubstantiated.

17. In relation to the salary increments, the Tribunal is satisfied that the complainant was given the opportunity to put forward her point of view and to make sure that her supervisors were aware of it. But having allowed the complainant ample opportunity to make her point, her supervisors made a final judgment, as they were entitled to do, on her work performance. There is no evidence of bias or unfairness in the procedure followed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SEVENTH SESSION

***In re* Andrews (Christopher) and others**

Judgment 1864

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Patent Organisation (EPO) on 5 June 1998 and corrected on 3 July by:

Mr C. Andrews
Mrs J. Barthl-Wagner (No. 2)
Mrs A.I. Berglund-Werner
Mr P.S. Bruzzese
Mrs B. Burke
Mrs M. Cappadonia
Mr G. Castriciano
Mr C. Cavestri
Mr G. Chebance
Mr G. Chistè
Mr T. Christodoulou
Mr E. Colonnella
Mrs A. Counillon
Mrs J. Diel
Mr S. Faggiano
Mr M. Gagliardi (No. 2)
Mrs R. Galloway-Przybilla
Mr J. Hamer
Mr W.B. Hauschild
Mr O. Hötzer
Mrs F. Ide
Mrs S. Jacobus-Prues
Mrs A.M. Kohlstadt
Mr P. Krasa
Mr J. Kröll
Mr A. Lovrecich (No. 2)
Mr G. Ludwig
Mrs M. MacFarland
Mrs S. Marchesi
Mr P. Martorana
Mr E. Mondi (No. 4)
Mrs P. Niggemann

Mrs B.-I. Nordmark
Mrs E. Pachta
Mrs I. Pether-Trost
Mr A. Rauter
Mr F. Scaglia
Mrs M.G. Sotgia
Mrs F. Townend
Mr C. Vullo
Mrs N. Werner

Considering the EPO's reply of 21 October 1998, the complainants' rejoinder of 25 January 1999 and the Organisation's surrejoinder of 15 March 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Considering the applications to intervene filed by Mrs Jeanine Draszcz and Mrs Franscesca Telari on 19 March 1999;

Having examined the written submissions and disallowed the complainants' application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants hold permanent appointments at the European Patent Office, the secretariat of the EPO. Except for Mrs I. Pether-Trost, who is German and serves in The Hague, they are non-Germans and their duty station is Munich. None of them receives the expatriation allowance as they do not fulfil the second requirement prescribed in Article 72(1) of the Service Regulations which reads:

> "An expatriation allowance shall be payable to permanent employees who, at the time they take up their duties or are transferred:
>
> a) hold the nationality of a country other than the country in which they will be serving, and
>
> b) were not permanently resident in the latter country for at least three years, no account being taken of previous service in the administration of the country conferring the said nationality or with international organisations."

At its 39th Session, held from 4 to 7 December 1990, the EPO's Administrative Council decided to grant the expatriation allowance and home leave entitlement to all staff of a nationality other than that of the country of their duty station. However, the Office was to submit a proposal for the revision of Article 72(1) b). Article 72 was thus partly amended with effect from 1 July 1990.

Two of the complainants told the President of the Office in a letter that they intended to contact a number of Administrative Council delegations with a view to further amendment of Article 72(1) b). By a letter of 23 September 1993, the President advised them against such a move, as it would have a "negative impact" on the Council's discussions.

In the absence of any further amendment, some thirty complainants asked the President, in letters of 29 April 1996, to grant them the expatriation allowance. The Administration rejected their request. Between 24 June and 19 November, the same complainants lodged internal appeals. They were referred to the Appeals Committee and the Administration so informed them in a letter of 25 July 1996. In its report of 7 January 1998 the Committee recommended rejecting them. The President endorsed that recommendation in a letter of 10 March 1998 – the impugned decision.

B. Citing the Tribunal's Statute and in response to arguments put forward by the Organisation in the internal appeal, the complainants submit that their complaints meet all receivability requirements.

They allege that by withholding the expatriation allowance the EPO discriminated against them. It arbitrarily created two categories of expatriate staff for no objective reason, since Article 72(1) b) is not a valid criterion for granting or withholding the allowance. It was thus in breach of equal treatment, a principle recognised in the case law, and a number of international texts including the Universal Declaration of Human Rights.

The system established in Article 72 is inconsistent and open to abuse: for example, someone who was granted the allowance on recruitment may keep it even after the "disqualifying period" has been completed. The rule is therefore "superficial and arbitrary".

They ask the Tribunal to quash the President's decision of 10 March 1998 and to order the EPO to pay them the allowance retroactively to their respective dates of appointment or, failing that, to 1 July 1990 or to 23 September 1992 or to the date of their complaints.

C. In its reply, the Organisation submits that both the main and subsidiary claims in the complaints are irreceivable. Apart from Mrs J. Barthl-Wagner and Mrs M. Cappadonia, none of the complainants challenged their pay slips in time. Contrary to the complainants' assertion, the Tribunal's earlier rulings that each non-payment decision may be challenged does not mean that the time limit for appeal need no longer be observed. Mrs Barthl-Wagner's second complaint must fail on grounds of *res judicata* (Judgment 664), and Mrs Cappadonia's complaint is irreceivable because she failed to challenge the President's decision of 15 May 1991 to dismiss her appeal against non-payment of the expatriation allowance.

In subsidiary pleas on the merits, the EPO cites Judgment 754 (*in re* Metten No. 4) under 6 in which the Tribunal ruled that for there to be breach of equal treatment, "there must be different treatment of staff members who are in the same administrative position. Where the circumstances differ, so may the treatment provided that it is a fair, reasonable and logical outcome of the difference". The issue is, therefore, whether the requirements set in Article 72(1) are reasonable and fair. The Tribunal has already heard complaints about this article and has indirectly confirmed that it is consistent with the principle of equal treatment. In the EPO's view, someone who has been living for at least three years in the country of his future place of employment with the EPO may be regarded as sufficiently integrated not to need an expatriation allowance.

There is nothing exceptional about the requirements in Article 72(1) b). Other organisations have similar rules because the simple fact of not being a national of the country of one's employment is not enough to warrant the grant of an expatriation allowance.

The complainants' examples of inconsistencies and abuses of the system as established under Article 72(1) b) are only hypothetical and are not sufficient to invalidate it. A rule's lawfulness depends not on whether it can be circumvented but on whether the goal it pursues is appropriate.

The adoption of certain amendments in 1990 is not proof that Article 72 is "superficial and arbitrary", since the Administrative Council has wide discretion in such matters. The amendments improved the situation for expatriate EPO staff and were the maximum the Administrative Council could allow without incurring criticism about its financial management from politicians in the EPO's member States.

Article 72 is not inconsistent with the international instruments cited by the complainants. Indeed, the Service Regulations are preceded by a statement adopted by the Administrative Council at its 55th Session to the effect that it has "noted with approval the President's declaration that the Office adheres to the said legal provisions and principles".

It points out that the complainants have no qualms about seeking to show that the rule is unlawful *ab initio*, while at the same time asking to have it applied to them.

D. In their rejoinder the complainants submit that every pay slip is an impugnable decision and rebut the Organisation's objections to receivability.

The EPO was wrong to infer from the case law that the Tribunal has implicitly found Article 72 to be consistent with the principle of equal treatment.

The Administrative Council's discretionary authority is restricted by higher law.

The argument that there are underlying political problems is unsound: payment of the allowance would have only a minimal impact on EPO expenditure.

They refute the Organisation's other pleas.

E. In its surrejoinder the Organisation submits that in their rejoinder the complainants put forward no arguments liable to modify the EPO's position, but that the absence of comment in no way implies acceptance on its part.

CONSIDERATIONS

1. The forty-one complainants are all employees of the European Patent Office. One of them is of German nationality and works in The Hague; the forty others are non-Germans and work in Munich. All claim the expatriation allowance provided for in Article 72(1) of the Service Regulations for employees of the Office. They request the Tribunal, in complaints which must be joined, to quash the decisions of 10 March 1998 whereby the President of the Office, in accordance with the unanimous

recommendation of the Appeals Committee, confirmed his refusal to pay the allowance in question.

2. Article 72(1), quoted under A above, the provisions of which are applied cumulatively, rules that employees who are nationals of a country other than the one they work in have no right to an expatriation allowance if, when taking up their duties, they had already been permanently resident there for more than three years. This is the case here.

3. The complainants seek the quashing of the contested decision, as well as the payment of the expatriation allowance from the date of their appointment or, subsidiarily, from 1 July 1990, or, failing that, either from 23 September 1992 or even from the date of filing their complaints. They claim that Article 72(1) b) establishes, without valid reason, two categories of expatriate staff, and that this distinction constitutes unjustified discrimination. They therefore refer to the principle of equal treatment recognised in the Tribunal case law, and also to such international instruments as the Convention No. 111 of the International Labour Organization, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

4. The defendant contends that the complaints are irreceivable, both the main and subsidiary claims, since the complainants did not challenge their pay slips in time. Furthermore, whereas two complainants have previously challenged the refusal to pay them the expatriation allowance, one of them submitted a complaint to the Tribunal which was dismissed (see Judgment 664, *in re* Barthl) and her present one is therefore *res judicata*; and the other, whose internal appeal was rejected, did not come before the Tribunal. In fact, the complainants may indeed challenge their last pay slips within the time limits of the complaint and argue, in support of their complaints, that Article 72(1) b) of the Service Regulations is unlawful, as appears from much supporting case law (see the cases cited in Judgment 1786, *in re* Skulikaris). Thus the Organisation's objection to receivability can only be upheld in part and the Tribunal will still examine the lawfulness of Article 72(1) b) of the Service Regulations, which is the

legal basis for the decisions arising from the monthly pay slips showing salaries which did not include the expatriation allowance.

5. However, although the complaints are partially receivable, in the Tribunal's opinion they fail on the merits. No doubt the rules governing the granting and retention of the right to be paid the expatriation allowance are debatable and this is what has led the Organisation to re-examine the situation of expatriate employees on several occasions. But while the system could certainly be improved, it is in line with legal requirements that the applicable rules should precisely define the notion of "expatriation", and fix a length of residence in the country prior to employment beyond which an employee may not be considered as expatriate. As is stated in Judgment 754 (*in re* Metten No. 4), for there to be breach of the principle of equality "there must be different treatment of staff members who are in the same administrative position. Where the circumstances differ, so may the treatment, provided that it is a fair, reasonable and logical outcome of the difference".

6. It is clear that the expatriation allowance is intended to take account of certain disadvantages arising from being a foreigner newly installed in a country. Employees who have resided in the host country for a long time are not subject to the same constraints as those recently installed. But fair and reasonable distinctions between the two must be based on objective criteria and, in this connection, length of residence prior to employment is just such a criterion. Naturally, the length of residence to be taken into account in order to make the distinction may be challenged, but in this matter the Tribunal recognises the Organisation's discretion, provided that the exercise of such power has no adverse consequences. In this case, a period of three years' residence beyond which the complainants may not be considered as "expatriates" would appear reasonable. Although some members of the Administrative Council are far from considering the system satisfactory and point to several inconsistencies as well as the abuses it may engender, and while a rule rigidly establishing length of residence may create "qualification threshold" problems, nevertheless breach of the principle of equality of treatment has not been proved. Even if retaining the allowance beyond a certain time is debatable, this does not mean that the

defendant may not establish residence conditions governing the right to expatriation allowance from the outset, as indeed other international organisations have done.

7. Since the argument of breach of the principles of equality of treatment has no substance, there is therefore no need to examine the defendant's arguments that the Tribunal has on several occasions already accepted, at least implicitly, the validity of paying the expatriation allowance to those of its employees who are not nationals of their country of posting and have not been residents for at least three years before taking up their duties.

8. Both the main and subsidiary claims presented by the complainants must fail.

DECISION

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SEVENTH SESSION

***In re* Böttger**

Judgment 1865

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Joachim Friederich Böttger against the European Patent Organisation (EPO) on 12 May 1998 and corrected on 26 May, the EPO's reply of 17 August, the complainant's rejoinder of 15 September, the Organisation's surrejoinder of 22 October 1998, the complainant's further brief of 13 January 1999 and the EPO's comments of 12 May 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German who was born in 1943, was an architect in the private sector before joining the EPO at its Directorate-General 4 on 1 September 1988 on a permanent appointment. He was assigned as a principal administrator to an A4 post related to two building projects. On 1 January 1992 he was promoted to grade A5.

One of the projects having being discontinued in the Spring of 1992, the complainant asked the President of the European Patent Office, the secretariat of the EPO, in a letter of 26 October 1992 to assign him to reserve status under Articles 46 and 114 of the Service Regulations.

On 3 December 1993 he signed an agreement with the President which stated that his post would be deleted from the 1994 budget. However, the EPO postponed assigning him to reserve status until 1 October 1994 to allow him to acquire certain social benefits. Meanwhile, he was to be entrusted with "special duties" in Directorate-General 4.

On 9 April 1996 the complainant sent a letter to the President saying that in accordance with Article 46(5) of the Service Regulations he wished to "make use of [his] priority for reinstatement" in a suitable post. The Vice-President in charge of Personnel Management replied in a letter of 10 May that reinstatement was not possible. In a letter of 6 December the complainant asked the President to make concrete proposals for his reinstatement. By a letter of 20 December 1996 the President confirmed what had been said in the letter of 10 May.

By a letter of 8 January 1997 the complainant lodged an internal appeal with the President against the decision of 20 December 1996. In a letter of 3 March the Director of Personnel Development told him that the President was unable to give a favourable response to his appeal and had referred it to the Appeals Committee. In its report of 16 December 1997 the Committee found the appeal to be receivable but recommended dismissing it. In a letter of 17 February 1998, which is the impugned decision, the Director of Personnel Development informed the complainant that the President endorsed this recommendation.

B. The complainant submits that, although Article 46 requires the EPO to explore all possibilities of reinstatement for a period of two years following assignment to reserve status, the right persists beyond this period of time. In short, the rule establishes a continuing duty of care on the part of the Organisation.

He adds that by commissioning an external firm for later building projects, the EPO denied him a fair chance.

The Organisation puts too narrow a construction on Article 46. It refused to reinstate him on the grounds that there were no suitable A5 posts, but it should also have explored the possibilities of putting him on an A4 post.

The EPO has always found "special solutions" for other cases, so it is strange that in his case it should adopt such a formalistic attitude and act in a dilatory manner.

He asks the Tribunal to order his immediate reinstatement in the Office in an A5 post or, failing that, an A4 post. He also claims costs.

C. The Organisation replies that the complaint is irreceivable because it challenges a decision which merely endorses the one taken by the Vice-President on 10 May 1996. The complainant therefore exceeded the time limit for internal appeals.

It explains that the complainant has no "absolute right" to reinstatement. Article 46(5) grants only a priority right, limited to two years, if a post falls vacant or is created during this time. As an architect, he was not qualified for any of the administrative or other posts which fell vacant or were created. Therefore, his candidature could not be considered.

The work undertaken later in the various EPO buildings did not warrant creating a budget post, which is why the Organisation brought in an outside contractor.

As to its alleged failure in its duty of care, it recalls that his assignment to reserve status was postponed by nine months, that is to 1 October 1994, to give him access to certain financial and social benefits.

The Organization was bound to propose to him only A5 posts according to Article 46, which protects the rights of permanent employees assigned to reserve status.

By accepting to have those provisions applied to him, he waived his right to any further legal claims.

D. In his rejoinder, the complainant cites the report of the Appeals Committee and states that the decision of 10 May 1996 not being a final one, his complaint is receivable.

The fact that he was given a permanent appointment shows that the EPO expected him to perform administrative duties once the building projects on which he worked were completed. The later building projects are proof that it needed to recruit him.

He denies having relinquished any further rights by signing the agreement of 3 December 1993.

The EPO failed in its obligations towards him. The obstacles it cites as preventing his reinstatement are unconvincing.

E. In its surrejoinder the Organisation maintains that the complaint is irreceivable.

It rebuts the complainant's pleas and adds that the current building projects can be handled by someone of a lower grade.

F. In a further brief, the complainant refers to an article from the "*Süddeutsche Zeitung*" of 19/20 December 1998 which says that one of the buildings which he had been in charge of was being extended. He adds that the EPO has undertaken new building activities at its headquarters. It had earlier denied him any information on its intentions.

G. In its comments, the EPO states that the complainant's further brief does not introduce any new argument liable to modify its position. It points out that the Appeals Committee unanimously found that the Office was right to refuse to keep him abreast of its building projects.

CONSIDERATIONS

1. The complainant, a German citizen, joined the EPO on 1 September 1988 as a principal administrator at grade A4 to take charge of two large building projects in Munich and in The Hague. On 1 January 1992 he was promoted to grade A5.

2. When the Organisation decided to abandon the project in The Hague, the complainant asked in a letter of 26 October 1992 to be assigned to reserve status as from 1 January 1995 under Articles 46 and 114 of the Service Regulations. In accordance with Article 46(3), the Vice-President in charge of Personnel Management consulted the General Advisory Committee, which concluded unanimously that the complainant's case met all the requirements for assignment to reserve status.

3. On 3 December 1993, the complainant signed an agreement with the EPO setting out the conditions of his assignment to reserve status. It said, among other things, that the assignment would start on 1 October 1994 and that he waived his right to any claims against the EPO.

The date of assignment to reserve status was determined so that the complainant could acquire entitlement to a pension and continue to benefit from the social protection scheme.

4. As he did not find employment in his occupation in the private sector, the complainant requested the President of the Office, in a letter of 9 April 1996, to reinstate him in a post commensurate with his qualifications. On 10 May 1996, the Vice-President replied that, in accordance with Article 46 of the Service Regulations, and after considering vacancies in other departments of the EPO, his reinstatement in a post at the same grade was not possible.

On 14 October 1996, the EPO sent the complainant a list of posts which had fallen vacant since November 1994. He was also informed that Article 46 of the Service Regulations had not yet been applied in other cases.

5. On 20 December 1996, the President confirmed the decision taken by the Vice-President on 10 May 1996 that his reinstatement was not possible. On 8 January 1997, the complainant lodged an internal appeal against this decision. The Appeals Committee reached the unanimous opinion that the appeal should be rejected. On 17 February 1998, the Director in charge of Personnel Development informed the complainant that the President had decided to dismiss the appeal definitively.

It is this decision which is impugned in the complaint.

6. The complainant asks the Tribunal to order his immediate reinstatement to a post at grade A5, or alternatively at grade A4, and the payment of costs.

7. Article 46(5) of the Service Regulations states that:

> "For a period of two years from the date on which assignment to reserve status takes effect a permanent employee shall have priority for reinstatement in any post corresponding to his grade which may fall vacant or be created, provided that he possesses the necessary qualifications and ability."

In the material case, this period was from 1 October 1994 to 30 September 1996. The complainant requested reinstatement on 9 April 1996.

8. On 23 September 1996, one week before the expiry of the two-year period of priority envisaged in Article 46(5), the complainant informed the EPO that he did not rule out the possibility of accepting a post at a grade other than A5 as an "interim solution".

In view of the date on which this request was made, it was manifestly impossible for the EPO to take it into account.

9. The complainant accuses the EPO of adopting a restrictive and purely formal application of Article 46(5) by only taking into consideration his reinstatement at grade A5. He also contends that, in good faith, the EPO aggravated his situation by promoting him to grade A5, thereby making his reinstatement more difficult.

The Tribunal cannot allow this argument. The good faith of the EPO, which is recognised by the complainant, demonstrates that it in no way intended to prejudice him.

10. In this case, the obligation of the EPO is not to reinstate the official who has been assigned to reserve status, but to make all the necessary efforts for his reinstatement. In other words, it is not an obligation as to the outcome, but as to the means employed to achieve the outcome.

11. The complainant has not proved that posts that he could have filled, corresponding to his grade and qualifications, fell vacant while he was assigned to reserve status or that the EPO has in any way disregarded his priority right.

12. The complainant also submits that the EPO could have called on his services as an architect for construction work after his assignment to reserve status.

The EPO was fully entitled to entrust construction work to outside contractors and had no obligation to create a post so that the complainant could be reinstated.

13. Although the complainant contends that the EPO failed to fulfil its duty of care towards its staff members, the written submissions show that the Administration made every possible effort to find the best possible solution for the complainant and therefore acquitted itself of its obligations towards him.

14. In 3 above, reference was made to the fact that the complainant had explicitly waived his right to any further claims against the EPO. In view of the conclusions reached by the Tribunal, it is not necessary to rule on this question, or on the EPO's objections to receivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SEVENTH SESSION

In re Verveer

Judgment 1866

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Daniël Verveer against the European Patent Organisation (EPO) on 5 June 1998, the EPO's reply of 10 September, the complainant's rejoinder of 21 October, and the Organisation's surrejoinder of 3 December 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutchman who was born in 1961, joined the European Patent Office, the EPO's secretariat, on 1 January 1988 as a patent examiner at grade A1. He is currently assigned to Directorate-General 1 (DG1) in Rijswijk/The Hague in the Netherlands, as a patent examiner at grade A3. The complainant, his wife and daughter live in Roelofarendsveen, a village thirty kilometres away from the Office. His wife works in Amsterdam, and their daughter attends a crèche (day nursery) in Roelofarendsveen.

On 7 February 1996, the complainant requested from the EPO either financial contribution towards the cost of his daughter's crèche placement, or a subsidised placement for his daughter in the crèche in his place of residence in Roelofarendsveen similar to the practice enjoyed by his colleagues whose children attend crèches near the Office.

By a letter of 14 November 1996, the complainant repeated his request and asked the Organisation to reply in writing. In a letter dated 4 December 1996, the President of the EPO told him that his request could not be met as it "exceed[ed] the possibilities of the Office" and continued that an individual placement would be "justifiable as an exception only if it had been foreseen by the Service Regulations, which is not the case".

The complainant filed an internal appeal on 7 January 1997. The Appeals Committee concluded that an "entitlement to crèche facilities of the employee's own choice ... cannot be inferred from the Service Regulations", and unanimously recommended that the appeal be rejected as unfounded.

In a letter dated 12 March 1998, he was informed by the Director of Personnel Development that the President had endorsed the recommendation of the Appeals Committee and thereby rejected his appeal. This is the impugned decision.

B. The complainant requests that the Organisation subsidise the costs of his daughter's crèche as it does for other EPO employees. He states that the provision of crèches for the children of EPO employees is governed by a working paper submitted by the President of the Office to the Budget and Finance Committee entitled "Subsidies with a view to setting up crèches in Munich and The Hague for the children of EPO employees" and that his right to a crèche place for his child in his place of residence can be found in this document. Under Articles 33(2)(b) and 50 of the European Patent Convention, the Administrative Council is competent to adopt rules for the grant of supplementary benefits to the permanent employees of the EPO, and through its Financial Regulations it has created the Budget and Finance Committee to which it delegates financial matters. He submits that because the Committee took note of the working paper, it effectively agreed with its principles.

The working paper did not place a geographical limit on the location of a crèche. He argues that paragraph 2.2 of the paper applies not only to Rijswijk, but to The Hague as well as other cities in the Netherlands. Further, in the selection procedure to be employed by the Office there is no legal framework governing the location of crèches. Article 23 of the Service Regulations provides that:

> "A permanent employee shall reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties."

The complainant states that since the Service Regulations do not limit the place of residence to Rijswijk or The Hague, the same must apply to the location of a crèche.

Paragraph 2.6 of the same working paper refers to serious difficulties in adopting in The Hague the same solution as in Münich. Therefore, the paper presented an alternative. The Budget and Finance Committee proposed and adopted the concept of a yearly subsidy to be allocated to each child. The complainant says that it is clear from paragraph 2.6 that the Office does not subsidise one crèche, but a number of crèche places. He notes that the Organisation did not implement the full extent of the working paper. However, the Organisation had subsidised a place in a crèche for the child of one of his colleagues, in the place of residence.

The complainant seeks an award of compensation for the non-provision of a crèche place in Roelofarendsveen "as of 07.02.1996, until the day they provide for such a place"; and, the provision of a place in the crèche in Roelofarendsveen under the same financial arrangements as applied to presently contracted crèches in Rijswijk, (to enable the place presently occupied by his child to be converted into a "company place" and so that no-waiting list would be applicable). As a subsidiary claim, he seeks compensation for the Office's non-provision of a subsidised day nursery place for his child (that is, the difference in cost to him between an EPO-provided crèche place and what he has paid/is paying now).

C. The Organisation argues that the complaint is unfounded.

It states first that there are no specific provisions in the Service Regulations for Permanent Employees governing the payment of the costs of day-care and education for children of pre-school age, and they do not consider the matter of the provision of crèches. There is no obligation on the part of the Office to provide crèche places, so an employee is not entitled to claim a place in a crèche or request that the Office bear the costs of day-care in a crèche of his own choice. In 1985, the Office made a discretionary policy decision to subsidise a crèche in Munich and crèche places in the Rijswijk/The Hague area. This policy, where all subsidised crèches are located near the employee's place of employment, received the tacit approval of the Administrative Council.

The complainant's references to Articles 33(2)(b) and 50 of the European Patent Convention relating to the competence of the Administrative Council and the Budget and Finance Committee are irrelevant. Only the President of the Office is responsible for the application of the Service Regulations, therefore, it is incorrect for the complainant to maintain that the working paper supports his arguments.

He is also incorrect to argue that the paper placed no geographical limit on the location of a crèche; the foreword to the paper is clear that one of the aims of the document is to "examine the proposals to reserve a certain number of places in the crèches in Munich or The Hague ...". Contrary to the complainant's suggestion, the possibility of subsidising crèche places in an employee's place of residence has not even been considered.

According to Article 23 of the Service Regulations, a permanent employee "... shall reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties", however, the Organisation is not obligated to compensate the complainant for the disadvantages that may result from his choice of location of residence.

He cannot claim a breach of the principle of equal treatment. The Organisation contends that, at present, no employee receives a subsidy for the costs of day-care in a crèche other than those subsidised by the Office close to the place of employment. The fact that the EPO has made exceptions in two cases cannot be questioned, as it is within its discretion to do so.

D. The complainant enlarges on his pleas. He states that every crèche place "contracted" by the Office is located in Rijswijk, not in The Hague. Therefore, employees living in this area have a crèche in their place of residence. In the case of Munich, the crèche is located in the very same building as the EPO offices.

He argues that although the President is responsible for the application of the Service Regulations, in the absence of relevant provisions in these Regulations, such a decision is beyond the discretion of the President, and is therefore governed by the Administrative Council and the Budget and Finance Committee. Under Articles 33(2)(b) and 50 of the European Patent Convention the decision to subsidise crèches must, the complainant says, have the approval of the Committee.

The discretion of the President must be exercised consistent with the principles of duty of care and equal treatment. The Office's decision to subsidise crèche places in Rijswijk only, discriminates against the vast majority of employees who do not reside there.

There would be almost "no financial difference" to the Organisation between the provision of a place in one of the present crèches in Rijswijk contracted by the Office and a subsidised crèche place in his place of residence, indeed it would be effectively cheaper. In cases like his, the EPO should allow for a crèche placement in the place of residence, and leave the decision as to the location of the crèche placement to the employee.

E. The Organisation states that the President responded to the needs of a growing number of staff members, and thereby fulfilled his duty of care towards them by submitting a paper to the Budget and Finance Committee regarding the setting up of crèches in The Hague and Munich. The Administrative Council "merely ... noted" the President's proposal, hence giving it their tacit approval without considering an amendment to the Service Regulations.

By approving the President's proposal, the Administrative Council also recognised the extent to which the President can exercise his discretion, particularly in his interpretation of "duty of care". As stated by the Appeals Committee, the Office fulfils its general duty of care by providing an in-house crèche or by subsidising crèche places near the place of employment. As was the case for his colleagues, the complainant was offered a place for his child in one of the crèches near his place of employment.

The argument that the provision of a crèche place in the complainant's place of residence is less expensive than in The Hague is irrelevant. Rather, the question is whether the complainant's rights have been violated, which they have not.

CONSIDERATIONS

1. The complainant, a Dutchman, joined the EPO on 1 January 1988 as a patent examiner at grade A1. His current grade is A3. He is assigned to DG 1 (Rijswijk/The Hague) and lives in Roelofarendsveen with his spouse and their little daughter.

2. The written submissions show that the complainant requested in February 1996 that the EPO pay a special contribution to resolve his family situation. He lives thirty kilometres away from his office and his spouse works in Amsterdam. The EPO does not have a subsidised crèche in Roelofarendsveen to which they can send their child during the daytime. He considers that he has been discriminated against in comparison with his colleagues who live in Munich or The Hague, where the EPO provides an in-house crèche, or subsidises crèche places.

According to the submissions, the complainant asked the EPO to subsidise the cost of a place in the crèche in his village, or to pay the difference between the total cost of a place in the crèche in his place of residence and the part of the cost that he would have had to pay himself if his child had a place in a crèche in Rijswijk.

On 12 March 1998, the Director-General definitively dismissed the appeal that the complainant had lodged with the Appeals Committee on 7 January 1997. It is against that decision that the complainant has filed this complaint with the Tribunal.

3. The complainant submits, in the first place, that the Service Regulations do not contain any provisions regarding crèches. This statement is correct.

Indeed, it was the Office which decided, starting in 1985, without any obligation under the applicable rules, to make subsidised places in crèches available to the children of staff members. The Office already subsidises crèches in Munich and The Hague, where a considerable number of its staff members live.

The EPO explains that its policy is designed to avoid absenteeism by young staff members due to their young children. It has found that this solution contributes to the sound functioning of the Office. It added that this practice does not involve any amendment to the Service Regulations with a view to creating a right of staff members to places in crèches. It is a simple measure designed to facilitate the functioning of the Office.

The complainant cannot therefore substantiate his plea by citing the silence of the Service Regulations on this issue, nor the practice followed by the Office with regard to subsidised crèches.

4. The complainant also bases his claims on the report of the Budget and Finance Committee, submitted to the 23rd Session of the Administrative Council of the EPO, held in Munich from 14 to 17 January 1986. This plea must fail. The Administrative Council took no decision on the report, but merely noted it.

5. The complainant also cites Article 23 of the Service Regulations, which gives staff members the freedom to reside where they wish, with the sole condition that their place of residence is at no greater distance from their workplace than is compatible with the proper performance of their duties. The complainant contends that, as a counterpart to this freedom, the Office is bound to guarantee the rights of its staff members to social benefits at their place of residence. He concludes that the Office is under the obligation to provide his daughter with a place in a crèche in Roelofarendsveen. This plea presupposes that the Office is obliged to subsidise the cost of placing his child in a crèche. But this obligation has not been demonstrated.

6. The complainant alleges that the impugned decision violates the principle of equality of treatment. He says that staff members who are resident in Rijswijk or Munich benefit from better treatment than he does. The complainant's argument is mistaken. The principle of equality of treatment only applies between staff members in a similar situation. In the material case, staff members whose place of residence is Munich or

The Hague, where there are subsidised crèches, benefit from the same treatment. But staff members, such as the complainant, who decide to reside in another location and do not wish to place their child in these subsidised crèches, are not in a similar situation. The plea must therefore fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

***In re* Haddad Salcedo**

Judgment 1867

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Nicolás Haddad Salcedo against the European Southern Observatory (ESO) on 25 May 1998, the ESO's reply of 17 August, the complainant's rejoinder of 17 September and the Observatory's surrejoinder of 28 October 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who was born in 1959 and is of Chilean nationality, joined the staff of the ESO in 1985 as an engineer at the astronomic observatory at La Silla in Chile. He has a permanent appointment as a local staff member.

At the beginning of the 1990s, the Observatory commenced a process of revising the Regulations for ESO Local Staff in Chile with a view to aligning the regimes governing local and international staff. By a circular dated 26 June 1991, the local staff in Chile were informed that the ESO's Council had approved their entitlement to an education grant for the years 1991 and 1992. A measure to this effect already existed in the Regulations applying to international staff. The award of this grant to the local staff was extended on an annual basis until 31 December 1996. In a memorandum addressed to local staff members, dated 3 April 1997, the Administration once again extended it until 31 December 1997. It nevertheless announced that for economic reasons the budget for the grant in 1997 would be frozen to the 1996 level of expenditure, and the maximum amounts reimbursable ("ceilings") would be reduced by approximately 25 per cent.

On 29 April 1997, the complainant submitted an appeal against this decision to the Director of ESO in Chile. The latter rejected it on 15 May. On 20 May, the complainant submitted a second appeal, this time to the Director General. In its report dated 12 March 1998, the Local Staff's Joint Advisory Appeals Board recommended rejecting the decision to reduce the ceilings of the education grant on the grounds that it had been taken unilaterally and in a discriminatory manner, and it recommended incorporating provision for the grant into the applicable texts. By a letter of 23 April 1998, which is the impugned decision, the head of Administration informed the complainant that the decision of 15 May 1997 had been maintained.

B. First, the complainant submits that the payment of the education grant had been regularly renewed until 1997 and deduces that it is henceforth an acquired right. The new Local Staff Regulations proposed in 1991 were never approved. If, as was originally envisaged, the education grant had been incorporated into those texts in 1991 local staff members who had reached the ceilings of the grant would not now be prejudiced in comparison with international staff, who are not affected by the reduction. Invoking the principle of equality of treatment, the complainant contends that the objective of reviewing the Local Staff Regulations was to eliminate the differences affecting local staff in relation to international staff.

He then emphasises the social nature of the grant. Assuming that this benefit would be included in the official texts, certain families were encouraged to place their children in more expensive schools. Allowing 8 per cent for inflation the 25 per cent reduction in the 1997 grant ceilings meant an overall reduction of 33 per cent compared to 1996. He considers that the withdrawal of the grant or a substantial drop in the amounts reimbursed could have damaging consequences for families, and particularly for children if they have to change schools and face a lower standard of education.

Finally, he recalls the unanimous opinion in his favour of the Local Staff's Joint Advisory Appeals Board.

The complainant asks the Tribunal to quash the decision of the Director General which was communicated to him on 23 April 1998 and to declare that the grant in question forms part of his "remuneration package". He asks for costs to be paid by the Observatory.

C. In its reply, the Observatory contests the receivability of the complaint. It observes that the complainant has not provided supporting documentation and contends that he has not shown that an individual decision was taken against him.

Subsidiarily, it submits that the complaint is unfounded. It disagrees that the maximum reimbursement amounts of the grant were reduced by 33 per cent and, in this respect, prefers to refer to the "freezing" of the grant, rather than its "reduction".

The Observatory contends that the complainant has not demonstrated that his acquired rights were prejudiced. It submits that officials only have acquired rights when the benefits which they receive are recognised as fundamental. Citing the case law of the Tribunal, it contends that the amount and conditions of the education grant do not meet this condition. It emphasises that upon each renewal of the grant the local staff were informed that the measure was only temporary and that it could not be considered as an acquired right.

The Observatory rejects the plea of inequality of treatment since it says that international organisations are free to apply different rules to different categories of staff. In the present case, it submits that the education grant is justified for international staff who might experience more financial hardship in the schooling of their children than local staff who live and work in their home country. It adds that this plea is even less justifiable since local staff benefit from allowances to which international staff are not entitled.

Considering the complaint to be irreceivable and, in any event, unfounded, it maintains that the complainant is not entitled to costs.

D. In his rejoinder, the complainant rejects the Observatory's argument that there is no decision affecting him individually: the letter of 15 May

1997 refers explicitly to the "reimbursement of the education expenses for [his] children".

He explains, with supporting figures, his increased expenses for 1997 as a result of the impugned decision which for two of his children he puts at 44 per cent of his net monthly salary in that year. His children go to a private school and he made this choice, not out of "snobbism", but because state schools in Chile provide a lower quality education.

The complainant rejects the other arguments and asks that, in accordance with Article LS VI 1.10 of the Local Staff Regulations, the costs be paid by the organisation.

E. In its surrejoinder, the Observatory still contests the receivability of the complaint. It observes that the general decision of 3 April 1997 was followed by individual decisions and that local staff members, including the complainant, did not appeal against those decisions in time.

With regard to costs, it notes that the Local Staff Regulations have been amended and that the provision to which the complainant refers is no longer in force.

CONSIDERATIONS

1. The complainant, a Chilean national, joined the ESO in 1985 on a permanent appointment as an engineer at the astronomic observatory at La Silla in Chile.

2. In the early 1990s the ESO began to revise the Local Staff Regulations with a view to bringing its provisions closer to those applicable to international staff. While the new Regulations were being discussed in draft, certain disputes arose which resulted in a delay in finalising those texts. New Local Staff Regulations were adopted and became effective only on 1 January 1998.

3. In 1991 the ESO decided to pay the local staff an education grant, on a temporary basis, for 1991 and 1992, and in its reply, the Observatory accepts that this payment was intended eventually to become part of the Local Staff Regulations that were then under review. However, staff

members were informed that the education grant was a temporary measure and would therefore not establish an acquired right. The grant provided for reimbursement of 75 per cent of certain specified categories of expenses, subject also to overall monetary limits which varied according to the age of the child and the type of expense. The payment of the grant was thereafter extended annually from 1993 to 1996.

4. The Observatory submits that the cost of the education grant had increased from 160,000 German marks in 1991 to 220,000 marks in 1996, and was then estimated to increase to 290,000 marks in 1997. Due to financial constraints on ESO, its Finance Committee decided to "freeze" the expenditure on the education grant at the 1996 level adjusted for inflation.

5. By a memorandum dated 3 April 1997 the Observatory informed the local staff that it had approved the continuation of the education grant for the year 1997 subject to a revision of the conditions of payment in order to limit total expenditure to the 1996 level and that, consequently, the maximum reimbursement amounts ("the ceilings") had been reduced by approximately 25 per cent. The complainant appealed against that decision on 29 April 1997, requesting that the decision to reduce the ceilings be declared invalid, and that the education grant, under the conditions applicable in 1996, be declared a permanent benefit. The Director of ESO in Chile refused his appeal on 15 May 1997, and he then appealed to the Director General.

6. The Director General referred that appeal to the Local Staff's Joint Advisory Appeals Board. That Board recommended on 12 March 1998 that the Director General invalidate the reduction of the ceilings of the education grant, that any modification in the grant should be done uniformly for all staff, and that the education grant should be incorporated in the current Local Staff Regulations. By a letter dated 23 April 1998 the head of Administration informed the complainant that the Director General had decided to maintain the Director's decision of 15 May 1997. That is the decision impugned by the complainant.

7. The complainant states that reducing the maximum amounts reimbursable by 25 per cent was equivalent to a 33 per cent reduction taking

into account an annual inflation rate of 8 per cent. In order to implement the budget "freeze" decided on by ESO he accepts that:

> "... there were several possibilities, all of them affecting in a certain degree all or some of the staff. It was decided that the modification of the ceilings was the alternative that would cause less impact, since it would only affect those officials whose children are in the most expensive schools (in 1996, approximately 10% of the staff reached the grant's ceilings)."

8. The complainant pleads:

(i) that he has an acquired right to the payment of the education grant, even though it was originally given as a temporary measure for two years, because it had been granted continuously for a period of seven years and it had been intended to incorporate it into the revised Local Staff Regulations;

(ii) that children's education is usually planned in the medium or long term; for a grant of this nature to be effective, it must continue for the required period, i.e. the duration of their education; a considerable reduction in its amount causes serious economic damage to the family, and may affect the children if the parents are compelled to send them to a school of a lower standard.

(iii) that the education grant ceilings for international staff were not modified, although the same reasons existed for reducing them, and there was thus unlawful discrimination against local staff (Judgment 1616, *in re* Echeverriá Echeverría and others).

He asks that the decision of 23 April 1998 be quashed, that the Tribunal declare the education grant to be a permanent benefit included in his remuneration package, and asks for costs.

9. In its reply the Observatory maintains that the complaint is irreceivable as the complainant has not alleged that he was individually affected by the general decision communicated on 3 April 1997; it adds that if the complainant were to allege in his rejoinder that he was individually affected, the question would then arise as to whether he had challenged the relevant decision within the applicable time limit.

10. The Observatory argues further that the complainant does not explain how and to what extent the decision to reduce the ceilings of the

grant affected him, but merely states that, in general, there was a reduction of 33 per cent. It contends that the complainant did not suffer a reduction of 33 per cent.

11. The Observatory submits that:

(a) Having regard to the circumstances in which the education grant was originally given as a temporary measure, and then extended, it was not a right "which both parties [intended to] be inviolate" (see Judgment 366, *in re* Biggio No. 3 and others, under 6), nor was there any guarantee given by the Observatory as to its continuance (see Judgments 366; 369, *in re* Nuss; and 372, *in re* Guyon No. 2).

(b) In any event, staff members of international organisations have no acquired rights to the amount and the conditions of payment of an education allowance (Judgment 368, *in re* Elsen and Elsen-Drouot).

(c) Before accepting a plea of breach of acquired rights, the Tribunal must consider what effect the change in the education grant had on the staff members' pay and benefits (Judgment 832, *in re* Ayoub and others); and the complainant has failed to place necessary evidence of that before the Tribunal.

(d) There is no discrimination against local staff, because the payment of an education grant to international staff is legitimate compensation for the difficulties of living and working in a foreign country, and in a different cultural environment, which local staff do not face. In any event, a proper comparison is not possible without considering the entire remuneration package, because there are some benefits which only local staff receive.

12. In his rejoinder, the complainant pleads that in 1996 in respect of his elder daughter he received 961,051 Chilean pesos, but only 706,815 pesos in 1997; and that in respect of his two daughters he had to spend 634,000 pesos more in 1997 than in 1996 – and that, he says, amounted to "approximately 44% of his net monthly salary during 1997". The complainant has given some details of the amounts received by him in 1996 and 1997, in an endeavour to establish that the changes made in 1997 affected him seriously.

13. As the Observatory correctly submits in its surrejoinder, in his internal appeal the complainant had only challenged the abstract and general decision contained in the memorandum of 3 April 1997; that decision did not affect all local staff members alike, but only those whose expenditure exceeded or was near the ceilings. The complainant did not question the application of the memorandum to himself, either in the internal appeal or even in his complaint to the Tribunal. The Tribunal therefore holds that his complaint is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Mark Fernando, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

MARK FERNANDO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-SEVENTH SESSION

***In re* Balkenhol** **Judgment 1868**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Bernd Balkenhol against the International Labour Organization (ILO) on 5 June 1998, the ILO's reply of 25 August, the complainant's rejoinder of 11 November and the Organization's surrejoinder of 2 December 1998;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is German and was born in 1949, joined the staff of the International Labour Office, the secretariat of the ILO in 1977 as an "associate expert" under a fixed-term contract and in 1979 he was appointed to a position financed from the regular budget. In 1985 the ILO gave him a contract without limit of time. By 1986 he held grade P.4. From 1986 to 1990 he was seconded to a technical cooperation programme in Dakar (Senegal) at grade P.5 under a fixed-term contract. His grade reverted to P.4 at the end of that period.

In August 1990 he was again seconded, on a fixed-term basis, to a technical cooperation programme based in Geneva and his grade went from

P.4 step 7 to P.5 step 6. His letter of appointment said that at the end of his assignment he would revert to his without limit of time status "under conditions to be specified by P/DEV" (the Personnel Development Branch). At the material time he was in charge of the Poverty-oriented Banking Unit in the Enterprise and Cooperative Development Department (ENTREPRISE).

As part of a staffing review in that Department, and as his secondment was soon to end, the complainant saw two members of the Personnel Department on 26 September 1995. By a note for the file dated 9 October the chief of Personnel Planning and Career Development (P/PLAN) confirmed that he would be "reintegrated" into ENTREPRISE and would return to grade P.4 as from 1 January 1996. That date was, however, subsequently deferred. In a note for the file of 23 October 1995 the complainant pointed out that his secondment need not end in December and he would qualify for personal promotion to P.5 as from March 1996.

The Director of ENTREPRISE proposed the creation of a regular budget post of "Head, Enterprise Finance Unit". He sent a description of the post to the Personnel Department with a minute of 3 June 1996 asking for its classification and for the appointment of the complainant to the post by direct selection at grade P.5. He added that the complainant had been "undertaking this work at P.5 level at Headquarters since 1990". In a minute of 16 July the chief of P/PLAN concurred with the appointment but told the Director that the post had been graded P.4 and that the complainant would revert to that grade.

By an undated minute received by the Personnel Department (PERS) on 19 July 1996 the Director of ENTREPRISE contested the grading of the post and asked to see the ratings applied. An exchange of minutes followed. The grading was twice reviewed by the Classification Unit and the grade was upheld. In a minute to the complainant of 6 February 1997 the Director of Personnel told him that the proposed post had been graded P.4 and that a further review would take place. On 17 February the complainant filed an appeal with the Professional Grading Appeals Committee against that decision.

The vice-chairman of the Committee informed the complainant on 18 March that it was unable to accept his appeal because no appeal lay against the grading of a vacant post. The complainant lodged a "complaint" with the Director-General on 15 September 1997, under Article 13.2 of the Staff Regulations, against the decision to grade the post P.4 and against the Committee's decision not to hear his appeal. On the same day the Director of ENTREPRISE sent a request under circular 575, series 6, for classification of the position as "Head, Social Finance Unit" together with a completed "position description questionnaire".

On 6 March 1998 the Director of Personnel informed the complainant of the Director-General's decision to reject his "complaint". That is the decision he impugns.

Meanwhile in a letter of 4 March 1998 the head of Personnel Planning and Career Development had informed him of the Director-General's decision to give him a personal promotion to P.5 as from October 1996. By March 1998 he had reached P.5 step 11, but after this promotion he only held P.5 step 8.

B. The complainant contests the grading of his post at P.4 and asserts that the Personnel Department did not follow "normal procedures" in grading it. Personnel altered the title on the job description from "Head, Enterprise Finance Unit" to "Senior Officer, Enterprise Finance" and lowered the qualifications required. In spite of several requests Personnel did not let the Director of ENTREPRISE know the ratings which resulted from applying the Master Standard of the International Civil Service Commission to grade the post. There was no transparency. Personnel did not properly inform the Selection Board that there was contention over the grade. They informed the Director of ENTREPRISE of the grading only two days before the Board met.

The Director of Personnel sent minutes to the complainant which referred to a "special decision" to grant him P.5 on secondment. Yet there was no mention of such a decision in his 1990 letter of appointment. Nor was there any mention therein of his reverting to P.4 when his secondment was over.

He submits that he was demoted through his personal promotion as he lost three steps which lowered his take-home pay. There was bias and prejudice against him, and he was treated unfairly. He suffered the consequences of "inconsistent grading methods". This led to "confusion" in his contractual situation because although he held a permanent contract, he had eight contract extensions over a fourteen-month period. His personal promotion was a "device" that Personnel used to sidestep the grading issue.

The Professional Grading Appeals Committee was wrong to refuse to hear his appeal since the post was not "vacant". He was the incumbent since he had been performing its duties for the past eight years.

Personnel was flexible in applying its procedures, and "systematically" applied them to his "detriment". For example, his right to accelerated increments for language allowance was withdrawn until his contract reverted to without-limit-of-time status because it was not open to technical cooperation staff. However, he was able to benefit from the personal promotion system which was not open to him as a technical cooperation staff member either. He concludes therefore that he should have been able to benefit from the accelerated increments during his secondment from 1990 to 1998.

He asks the Tribunal to quash the Director-General's decision rejecting his 13.2 "complaint": and, in particular, to instruct the Personnel Department to provide details of the grading ratings in writing; to acknowledge receipt of his request for classification of his post dated 15 September 1997; to produce evidence that the "requirements of the grading exercise" have been respected; to furnish the report of the Selection Board; to pay him the "accelerated language allowance" and to give him the number of steps he had before personal "promotion". He seeks damages for stress, anxiety, unfair treatment and "lack of consideration", as well as costs.

C. In its reply the Organization submits that the complaint shows no cause of action. The complainant kept the temporary P.5 status of his secondment until he obtained permanent P.5 status through personal promotion.

His claims for an acknowledgement of receipt of the request of 15 September 1997 for classification of his post, for a language allowance and for an award of damages for unfair treatment are irreceivable because he has failed to exhaust the internal means of redress, as Article VII(1) of the Tribunal's Statute requires.

The Organization points to a difference between the posts held by fixed-term officials, which are financed from the regular budget, and those of officials in technical cooperation projects, also known as "experts", which are financed from extra-budgetary sources. At the material time the Technical Cooperation Personnel Branch (EXPERTS), responsible for staff on such projects, was separate from the Personnel Department. On secondment on a fixed-term contract the complainant was at P.5, the grade set by EXPERTS, rather than P.4, the grade determined by Personnel who applied the ICSC Master Standard.

At the end of his secondment the ILO's sole obligation was to give back to the complainant his without-limit-of-time status, as well as the grade he had previously held with "annual increments corresponding to the period of detachment". Taking such increments into account, upon return to a regular budget position he was entitled to P.4 step 12 in 1 January 1996, and step 13 of the same grade in October 1996. The P.5 grade was only linked to his secondment.

The Professional Grading Appeals Committee and the Director-General were correct not to consider him as both the holder of a P.5 position with EXPERTS and the incumbent of a P.4 position financed from the regular budget.

The Personnel Department made only slight changes in the job description which were necessary to ensure consistency within the ILO of titles and minimum qualification standards. If the new post had been graded P.5 a competition would have been necessary.

The calculation of his steps upon promotion was done according to Article 3.4 of the Staff Regulations and he went from P.4 step 13 to P.5 step 8. He could not retain the steps he had held as an expert.

D. In his rejoinder the complainant insists that his request for the language allowance was an "argument" in his complaint and not a claim.

The distinction that the Organization draws between two kinds of fixed-term officials is irrelevant: he is a permanent official. He maintains that the post at issue was not vacant since he was performing its duties and that there was continuity of work, place of work and incumbent. There is nothing in the rules which says he had to return to a lower grade at the end of his secondment: Personnel wanted him to revert to P.4 "at all costs".

He wants the Administration to reveal what it told the Selection Board about the post in 1996, to produce evidence of the "special decision" to grant him P.5 taken in 1990 at the beginning of his secondment, and to clarify what his contractual status was at that time.

E. The Organization argues that the classifiers could not justify a grade higher than P.4 for his post. In any case if it had been graded P.5 a competition would have been held which would have delayed any promotion to P.5. The best option was to delay reverting to his initial grade until personal promotion could come into effect.

On promotion his salary was calculated in relation to the step "notionally" reached in grade P.4. If he had obtained promotion to a regular budget post at grade P.5 in 1990 he would have had fewer steps than as an expert. What the complainant saw as a drop in salary was just a return to his "permanent salary status".

CONSIDERATIONS

1. The complainant joined the International Labour Office in 1977 and served for two years as an "associate expert". He was given a fixed-term contract in 1979 financed from the regular budget. This became a contract without limit of time in 1985. In 1986 when he was at grade P.4 step 2, he was seconded from Geneva to a technical cooperation programme in Dakar (Senegal) at grade P.5. He was told at the time that on completion of his assignment he would revert to his substantive P.4 grade. In 1990, therefore, he changed from P.5 step 5 to P.4 step 6.

2. In August 1990 he was once more seconded by the Technical Cooperation Personnel Branch (EXPERTS) as Project Coordinator with his duty station at Geneva. He was told in a minute of 14 August 1990 that his without limit of time contract would be suspended during his assignment and also that the duties and responsibilities in the job description had been evaluated by the Personnel Department at grade P.4 "notwithstanding that EXPERTS may assign another grade when offering [him] the position".

3. The complainant took up his duties in 1990 at P.5 step 6. From 1992 he reported to the Director of the Enterprise and Cooperative Development Department (ENTREPRISE). On 9 October 1995 he was told that he would return to a grade P.4 post as from 1 January 1996. In a note for the file of 23 October 1995 he said that his secondment did not have to end on 31 December, and that there were good reasons for the Administration and himself to be more flexible about the "date of reintegration". He added that he would be eligible for personal promotion to P.5 as from March 1996.

4. In January 1996 there was no suitable permanent post for the complainant. On 3 June the Director of ENTREPRISE proposed the establishment of a new position of "Head, Enterprise Finance Unit" under the regular budget and submitted a job description corresponding to the duties the complainant had been carrying out over the past few years. He proposed that the position be filled by direct selection of the complainant.

5. With some alterations to the job description by the Personnel Department, the post was graded P.4. The changes made were that the title became "Senior Officer, Enterprise Finance" and the qualifications required for the post were slightly amended. Both the grade and the method of filling the post were approved by the Selection Board in July 1996. The Director of ENTREPRISE was told on 16 July that there was no objection to filling the position by direct selection of the complainant.

6. In July 1996 the Director objected to the grading of the post and requested details of the ratings given by the Classification Unit. He subsequently provided additional information to the Personnel Department which informed him on 16 October 1996 that they had reviewed the grading and confirmed the grade of the post at P.4.

7. The Director of ENTREPRISE was informed on 13 November that the complainant should be transferred to the position of Senior Officer, Enterprise Finance, at grade P.4 but, according to the Organization, he did not take the necessary action. He asked for a third grading exercise which again confirmed the post at P.4. In the meantime the complainant's P.5 fixed-term contract as an expert was extended several times.

8. On 6 February 1997 the complainant was informed by the Director of Personnel that the post proposed for his reintegration had been graded P.4 by the Classification Unit. He appealed against that decision on 17 February to the Professional Grading Appeals Committee. On 18 March 1997 the Committee declined to accept the appeal as there was "no recourse system set up for the grading decision on vacant positions".

The complainant appealed against that decision to the Director-General under Article 13.2 of the Staff Regulations. On 6 March 1998 the Director of Personnel replied on the Director-General's behalf refusing to uphold his appeal. She said that following the creation of a post similar to the one the complainant occupied, the grade was attributed according to normal procedures. The complainant's transfer to the new post was postponed pending the possibility of personal promotion. Since he held a P.5 post in ENTREPRISE he could not be the incumbent of a P.4 post financed by the regular budget, let alone lodge an internal "complaint" against the grading of the position. That is the decision impugned.

9. On 1 April 1998 the complainant was transferred to the new regular budget post upon the expiry of the last extension of his technical cooperation contract on 31 March 1998. In the meantime he was granted personal promotion by the Director-General on 4 March 1998 to grade P.5 which was retroactive to October 1996.

10. The complainant is asking the Tribunal:

(a) to quash the decision of the Director-General not to uphold his "complaint" under Staff Rule 13.2;

(b) to quash the decision of the Professional Grading Appeals Committee not to accept his appeal;

(c) to quash the Director-General's decision which graded the post that he is occupying at P.4;

(d) to instruct the Personnel Department to provide the details of the grading (ratings) in writing;

(e) to order the Personnel Department to acknowledge receipt of his request for classification of his post dated 15 September 1997;

(f) to order the communication to the Tribunal of the written evidence that the procedural and substantive requirements of the grading exercise were respected;

(g) to order that the Administration provide the report of the Selection Board meeting of July 1996 where this matter was first discussed;

(h) to order the Personnel Department to pay him the accelerated language allowance due and to also reinstate him at the step level of his salary before he obtained his personal promotion;

(i) to order compensation for the costs incurred in the preparation and presentation of this complaint (SF2,000); and,

(j) to award him compensation for "stress and anxiety suffered over a period of almost two years as a result of unfair treatment and lack of consideration" (the precise amount of the compensation is at the discretion of the Tribunal).

11. The complainant disputes that the post created in July 1996 was graded according to "normal procedures". He alleges administrative inconsistencies in the grading process for which he must suffer the consequences. He disputes the decision that the post was vacant and claims that the Director of Personnel admitted in the impugned decision that he was the incumbent of this post. He says that his letter of appointment made no mention of reverting to P.4 and that his request for reclassification of his post of "Head, Enterprise Finance Unit" on 15 September 1997 remains

unanswered; he takes this as evidence of bias and prejudice. He claims confusion over the title of the post after the Selection Board had taken a decision on the matter. He says he would have been prepared to enter a competition if the post had been graded at P.5. He asks how it is possible to "transfer" him to a lower grade. He submits that the Personnel Department has systematically applied its own procedures, where there is room for discretion, to his detriment. He contends that logically he should also have been entitled to an accelerated language allowance from 1990 to 1998, which is granted to holders of without limit of time contracts, since the personal promotion system, applicable only to regular staff, was applied to him while on secondment.

12. He contends that personal promotion was used to deflect his request concerning the grading of the post and that the personal promotion granted to him on 4 March 1998 was an abuse of his right to obtain redress. He says he has been demoted to a post graded P.4 without valid reason.

13. In its reply, the Organization emphasises the difference between fixed-term officials whose posts are funded by the regular budget and officials on technical cooperation projects. Those officials are known as "Experts", and their posts are financed from extra-budgetary sources, and a unit called EXPERTS is responsible for them. At the material time, this unit was separate from the Personnel Department. The appointment of an expert on a project does not give rise to any expectation of a career in the Organization. Experts are normally appointed without holding a competition. The ILO maintains that the complainant is mistaken in assuming that the position to which he was seconded in 1990 is the same as the one he now holds with the exception of a difference in the source of funding. The post created in 1996 was governed by Article 4.2(f) of the Staff Regulations relating to the filling of vacancies, and under which he could be transferred to that post without competition. If the post had been graded P.5 he could not have been appointed to it without a competition. The ILO claims that its sole obligation was to give the complainant his

without limit of time status back at his previous grade with the appropriate step in view of the period of secondment. The complainant did not have the right to retain the P.5 grade which was linked to his secondment. That grade was not based on the ICSC Master Standard and his post was not subject to competition procedures.

14. The Organization says that now he is the incumbent of the new post he can apply for a review of its grading in accordance with circular 253 series 6. It claims that the decision of the Professional Grading Appeals Committee and the decision of the Director-General not to recognise the holder of a P.5 position with ENTREPRISE as the incumbent of a P.4 position financed from the regular budget were correct. The grading of the position is essentially an internal matter outside the competence of the Tribunal, although the Organization agrees that the complainant would have had a right to complain if there had been an "abuse of power or a similar flaw".

15. The Tribunal is satisfied that the post occupied by the complainant while he was on secondment, financed from extra-budgetary sources and graded P.5 by EXPERTS is not the same as the post at P.4 created in July 1996 and financed from the regular budget, although the duties were basically the same. The complainant does not appear to grasp this, since he refers in his complaint to the post created in 1996 as "his" post as if it were the same post as the one he occupied in ENTREPRISE. Contrary to his allegations, the Organization did not admit in the impugned decision that it was "his" post. His transfer to the new post did not take place until 1 April 1998, after his personal promotion to grade P.5. The Professional Grading Appeals Committee was correct in refusing to accept his appeal because the right of appeal under circular 253 belongs to the incumbent of the post and the complainant was not the incumbent at that time. However, as the Organization points out, now that he occupies the post he can bring an appeal against the grading.

16. As for the grading of the new post at P.4, this was done according to the Master Standard and was reviewed three times prior to the transfer of the complainant. The change of title from "Head of Unit" to "Senior Officer" is explained by the fact that the Unit was to be a small one. There

was also a wish to avoid "unnecessary hierarchical structuring". The changes in the requirements for the post were needed for the sake of consistency with similar ILO job descriptions and were aimed at introducing flexibility; in any event they did not affect the complainant as he could have been transferred without competition. The Tribunal does not find any "confusion" in the title of the post.

17. The Professional Grading Appeals Committee is an independent, impartial body established by the Director-General under circular 253. The circular provides that the incumbent of a post may appeal, through his responsible chief, against the grade allocated to the post by the Personnel Department. Paragraph 40 of circular 253 series 6, which is about reviewing procedures, provides:

> "Individual reviews of the duties and responsibilities attached to positions will be undertaken by [the Personnel Department] under any of the following conditions:
>
> (a) whenever a new position is created ..."

18. There is no evidence whatsoever that Personnel's reveiwing procedures were carried out in an abnormal manner. Every effort appears to have been made to establish the correct grade. The Personnel Department took additional information provided by the complainant's Director into account and, at his request, carried out a third examination. The Tribunal will not ordinarily review the technical aspects of such reviewing procedures, and there is no evidence of an abuse of authority in this case. It is immaterial that the complainant says he was willing to submit to a competition since the post was not graded at P.5 and therefore not open to competition.

19. The Tribunal considers that the Organization has made every effort to accommodate the complainant, who is regarded as a valued worker. The end of his secondment was delayed again and again to his benefit, and when he was ultimately transferred he had already received personal promotion to grade P.5 retroactive to October 1996. The complainant grossly exaggerates when he categorises his personal promotion as an "abuse of right".

20. The Organization, while admitting the receivability of the complaint in general, submits that three of the heads of relief sought by the complainant are outside the ambit of the decision impugned. These are: an order that the Personnel Department acknowledge receipt of his request for the classification of his post dated 15 September 1997 (which the Organization states that it never received); an order to pay him the accelerated language allowance; and, an award of compensation for stress and anxiety.

21. The order to the Personnel Department to acknowledge receipt of a request for classification of a post and the order to pay him a language allowance are not related to the impugned decision. No claim for compensation in this respect was before the Director-General when he was considering his final decision. Therefore, none of these claims is receivable on the ground of the complainant's failure to exhaust the means of internal redress.

22. The Tribunal dismisses the substantive claim and all consequential claims.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Mark Fernando, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

MARK FERNANDO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

***In re* Hemmerlein-Bengsch** **Judgment 1869**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Helmtraud Hemmerlein-Bengsch against the European Patent Organisation (EPO) on 24 August 1998, the EPO's reply of 13 November 1998, the complainant's rejoinder of 18 February 1999 and the Organisation's surrejoinder of 20 April 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is German and was born in 1942. On 1 March 1992 she joined the European Patent Office, the secretariat of the EPO, on a one-year contract as an auxiliary staff member in the Public Relations Department of Directorate-General 5 (DG5) in Munich.

In February 1993 the Office transferred her to DG4 to a new Team for Communication and Culture and extended her contract to 31 May 1993. The post of administrator in that Team, at grade A3, was advertised under reference EXT/634 in the EPO *Gazette* 11/93 of 22 March 1993. The complainant applied and by a letter of 27 May from the Director of Personnel Management she was offered the post from 1 June 1993 on a fixed-term contract for five years. The reason for its being fixed term, he told her, was because "the Team for Communication and Culture is a new unit and it will therefore be some years before developments and requirements can be definitively assessed". Her first contract being about to expire, she signed the new one the same day and was appointed to the post.

The Team she joined was however dissolved on 1 December 1995 and in November 1995 the Office transferred the complainant and her post to the Department of Personnel Development. It reassigned her with her post in February 1997 to the Department of Service Regulations and Pay Policy and sent her a description of her duties for the period of her contract still to run. The Director of Personnel Development had a meeting with her on 4 July 1997 and gave her warning that her contract would not be renewed. The Director of Personnel Management confirmed as much in his letter of 9 July 1997 informing her that no extension would be possible beyond the expiry date of the contract on 31 May 1998 and there was no prospect of her employment becoming permanent.

She appealed against that decision on 6 October 1997. The Appeals Committee recommended rejecting her appeal in a report of 4 May 1998. In a letter of 25 May to the complainant the President of the Office endorsed the opinion of the Committee. That is the decision under challenge.

B. The complainant contends that the Office had assured her she would be employed permanently, but had reneged on its promise. It had led her husband to believe that she would be offered a permanent contract "at the latest after expiration of the fixed-term contract". On the strength of those assurances she had given up permanent employment in a national patent office to work for the EPO.

She says the post advertised in the Gazette of 22 March 1993 was announced not as a temporary post for a contract staff member, but as a "permanent position". Only immediately before signing her contract did she learn that the post had been limited to five years. Yet some of the duties relating to internal communication appeared to be of a permanent nature and corresponded to those she had already been doing. Her first contract had only days to run: because time was running out she signed the new one on 27 May, still trusting the Office to fulfil its promise.

The Office carried out a strategy to "undermine and weaken the duties and responsibilities" assigned to her, particularly those of a permanent nature. There was breach of the duty of care it owed her. Giving her a limited contract was moreover in breach of Article 1(2) of the "Conditions of Employment for Contract Staff at the European Patent Office". It was not a question of solving a "temporary staff shortage" or performing tasks which might occasionally arise: the duties she performed were permanently required. There was breach too of the terms of the Office policy on contract staff published in the *Gazette* 7/97 of 21 April 1997 in which the management of the Office confirmed that "the conditions of employment for contract staff should normally only be applied where the task concerned is of a non-permanent nature". She was treated unfairly. Other staff members whose contracts expired in April and June 1998 got permanent positions. The complainant did not, which offended against the principle of equal treatment.

Furthermore her staff report was given to her one year late, on 18 February 1997, in order to deprive her of the opportunity to apply for another post. This was at odds with the General Guidelines on Reporting which provide for appraisal every two years. The appraisal, she submits, should have been carried out by December 1995 at the latest.

She is facing other consequences of the Office's failure to fulfil its promise in that she is not entitled to unemployment benefits and her pension entitlement will be affected by its refusal to grant her permanent employment.

She asks for the quashing of the decision of 25 May 1998 not to extend her contract, a permanent post at grade A3 and costs. Alternatively, she seeks compensation for "the actual damage that has already been sustained and will be sustained ... owing to the refusal of a permanent employment".

C. In its reply the EPO holds that the complaint is devoid of merit.

It denies making her a promise of permanent employment, an argument not put forward by the complainant in her internal appeal. The EPO finds it strange that she cites oral promises made to her husband when she was more directly concerned by her employment than he was and says that she has adduced no evidence of any promise. The complainant's letter to a member of the German Parliament, a former Federal Minister of Justice, asking her to intervene on her behalf, does not refer to any alleged promise either. That request for intervention was moreover in breach of the complainant's duty of discretion laid down in Article 14(1) of the Service Regulations.

Nothing in *Gazette* 11/93 said her post was permanent and she did not sign her contract under duress. Even vacancy notice EXT/634 for her post said "it is intended to fill this post on contract". At no stage did the Office give the complainant reason to hope for an extension of contract or permanent employment. The Director of Personnel Management warned her nearly one year before her contract expired that there would be no renewal. His letter of 9 July 1997 referred to her meeting with the Director of Personnel Development of 4 July when he explained the reasons. She was wrong to say extension was refused "without giving any further reasons". She had ample warning, and had the right to apply for other vacancies.

There was no breach of the Conditions of Employment for Contract Staff: Article 1(2) says, as the Appeals Committee pointed out, that fixed-term contracts can be concluded "for other legitimate reasons". There was a reason for such a contract: it was not known how the new Team she was assigned to would develop.

The Office did not "undermine" her duties. After the winding up of the Team she was given some tasks on an ad hoc basis. It was with the complainant's agreement that the Office amended her job specification in 1997, so she cannot claim her duties were withdrawn without notice. At the end of her contract the complainant was not performing work of a permanent nature.

The case of the other staff members who became permanent in 1998 was different. Tasks assigned to them proved to be permanent: therefore there was no breach of equal treatment.

It did not fail in its duty of care to her. The complainant could have opted for the German pension and social security schemes, including unemployment insurance when signing her five-year contract but she did not.

As for the matter of her delayed staff report, the Organisation points out that the argument was not raised during the internal appeal. In any event, the complainant contributed to the delay by, to date, not signing or returning the report to the Administration.

D. In her rejoinder the complainant rebuts arguments put forward by the defendant and enlarges on her pleas. She did mention the promises that the Office had made to her to the Appeals Committee. She referred to them at the hearing of 21 April 1998: there was simply no mention of them in the Committee's report.

She insists that the post of administrator was advertised in the *Gazette* as a permanent post. She was already performing the duties of the post within the Team, and had no reason to consult the vacancy notice for more information: so it was only on 27 May 1993 that she was advised that the post was not unlimited in time.

Moreover the duties of the "internal communication" team were and still are of a permanent nature. She was offered a contract limited in time even though it was clear her duties were ongoing. She should have been employed on a permanent basis, at the latest when tasks were redistributed in Personnel Development, because the staff then continued the work they had been doing before the Team was set up.

She did not have the opportunity to opt for German pension and social security schemes. The assumption in the letter of appointment of 27 May 1993 was that she would opt for the EPO's own system. She had only one working day to accept the contract.

As regards her staff reports, there was a delay of more than one year in preparing the report for the period 1 June 1994 to 30 November 1995. There were irregularities for which the complainant was not responsible.

E. In its surrejoinder the Organisation enlarges on its arguments.

The complainant was never given a promise that her position would become permanent. As she acknowledged in her rejoinder, the alleged promises were to the effect that she would "be offered a permanent employment following the one-year contract", an auxiliary staff contract, from March 1992 to February 1993 which was extended to 31 May 1993. She should have mentioned such a promise upon signing the five-year contract.

The Gazette only announces that posts are open for applications: it is the vacancy notices which have legal validity and state whether a post is to be permanent or on a contract basis. The *Gazette* in question did not carry the information as to whether the post was permanent or not. The complainant must have read the vacancy notice in order to apply for the post. It was through her own negligence if she only became aware that the post was for a fixed-term when she signed the five-year contract. In any event, she would have been at liberty to sign the contract subject to reservations, but did not do so.

As the Appeals Committee underlined, the permanent nature of duties is not the only factor which determines whether a job is permanent. The Office can also take account of future staffing requirements. It told her at the outset that it was not known what future staff requirements would be.

CONSIDERATIONS

1. The complainant joined the European Patent Office, the EPO's secretariat, on 1 March 1992 on a one-year contract as an auxiliary staff member and worked at headquarters in Munich. The conditions were governed by the employment and social welfare legislation in force at the place of work. The initial contract was extended to 31 May 1993 by mutual agreement.

2. The complainant applied for the post of administrator at grade A3 in the new Team for Communication and Culture at DG4. She was successful and was offered a five-year contract governed by the Conditions of Employment for Contract Staff which she signed on 27 May 1993. The Director of Personnel Management told her in a letter of 27 May 1993 that it would take some years until developments and requirements could be definitively assessed.

3. It was decided following a consultant's report in May 1995, that the Team was not functioning satisfactorily and would be dissolved as from 1 December 1995. The complainant was transferred with her post to the Personnel Development Department. By letter dated 14 January 1997 from the Director of Personnel Management she was informed that due to the

reorganisation of the Department she was to be assigned to the Department of Service Regulations and Pay Policy from 1 February 1997 until the end of her contract. On 4 July 1997 she was orally informed by the Director of Personnel Development that her employment could not be extended beyond 31 May 1998. That was confirmed in writing in a letter of 9 July 1997 from the Director of Personnel Management.

4. The complainant lodged an internal appeal against that decision on 6 October 1997. In an opinion dated 4 May 1998 the Appeals Committee recommended that the appeal be rejected as unfounded. The President of the Office accepted that recommendation and rejected her appeal by a letter of 25 May 1998, which is the decision impugned.

5. The complainant seeks the quashing of the impugned decision, a permanent position at grade A3 and costs or, alternatively, compensation for damage she has suffered.

6. The complainant contends that her husband was expressly assured in November 1991 by the Vice-President in charge of Legal and International Affairs (DG5) that she would get permanent employment at the latest after the expiration of the fixed-term contract and therefore she gave up her permanent employment in a national patent office. She states that the post for which she applied was announced in the *Gazette* 11/93 as a permanent position. It was only on 27 May 1993 when she saw that her contract was for a fixed-term of five years that she knew that it was not. She felt compelled to sign.

7. Following the dissolution of the Team for Communication and Culture, its work was divided in November 1995, between the Personnel Development Department (D 4.3.2) and DG5. The complainant's job description remained unchanged. She says she was in charge of "internal communications" which, as a task of a permanent nature, should not have been governed by a contract limited in time.

8. When the Personnel Development Department was reorganised and the complainant was assigned to the Department of Service Regulations and Pay Policy (D 4.3.2.3), a new Internal Communications Department was

formed in which the complainant was not employed. She claims that the purpose of this action was to "undermine and weaken the duties" assigned to her. The new job description limited the scope of her duties to those of a non-permanent nature.

9. The Office policy requires that Conditions of Employment of Contract Staff should normally only be applied where tasks are of a non-permanent nature. Yet D 4.3.2.3 carried out some tasks which were, and have remained, permanent. She should therefore have got a permanent position. Twenty-eight staff members whose contracts expired in April and June 1998 were given permanent positions while she was not: that constituted breach of equal treatment. She complains that her appraisal was completed only on 18 February 1997, more than one year late, thus violating the General Guidelines on Reporting. Lastly she lists the damage she has suffered.

10. The Organisation denies there was any promise of permanent employment in November 1991. Whatever may have been said by the Vice-President of DG5 the latter was not assigned to a personnel department and did not have the authority to give a "promise" of a permanent position. The complainant did not invoke any such promise when offered the five-year contract and never filed an internal appeal in relation to the alleged promise. Furthermore, the complainant showed she was aware of the absence of a promise in her letter to the former German Federal Minister of Justice asking for her intervention with the President (which she should not have sought), when she stated: "It has not yet been possible to obtain from my employer a binding assurance that my employment will be extended beyond the term of the contract and made permanent". When she was notified of her reassignment to D 4.3.2.3 on 14 January 1997 she was informed what her duties would be from 1 February 1997 until the end of her contract. There was no mention of any possibility of extension.

11. The Organisation says that, under Article 1(2) of the Conditions of Employment for Contract Staff, fixed-term contracts may be "concluded not only for duties which are not permanent, but also if justified for other legitimate reasons". *Gazette* 11/93 of 22 March 1993 merely said the post had been advertised, while the vacancy notice stated that it was being filled

"on contract". The Organisation does not therefore accept that the complainant was unaware that the post for which she applied was for a fixed term: indeed the covering letter accompanying the contract said so, the reason being that the Team was a new unit and it would be some years before development and requirements could be definitively assessed. Therefore, the Organisation had legitimate reasons for offering the complainant a fixed-term contract.

12. The Organisation refers to the finding of the Appeals Committee that there was no evidence to support the complainant's claim that the decisions taken by the Administration when dissolving the Team were designed to undermine her job. A job specification had been drawn up in January 1997, with her agreement, and there was no withdrawal of duties without prior notice, as alleged. The Appeals Committee says the Office was justified, following the failure of the Team, in giving her mainly ad hoc personnel duties until the expiration of her contract. These duties were not of a permanent nature.

13. The Organisation refers to the twenty-eight staff members who got permanent employment while the complainant was excluded. It says the persons whose contracts were converted into permanent appointments were recruited at a time when the Organisation was carrying out a significant reorganisation of its work. It was subsequently able to judge whether the duties of these persons were of a permanent nature. The complainant was aware she was being recruited to join a newly created unit whose future would depend on results. The tasks performed by the persons mentioned proved to be permanent, whereas those performed by the complainant largely disappeared with the closure of the Team to which she had been reassigned.

14. The Organisation denies it is in breach of its duty of care. The complainant signed the five-year contract knowing there was uncertainty about future staffing needs. There is no obligation to create a permanent post without justification. One of the purposes of the discussion with the Director of Personnel Development on 4 July 1997 was to let the complainant know she could apply for any permanent vacancy.

15. The complainant's assertions about her staff reports were not raised in the internal appeal procedure. The staff reports had no bearing on the complainant's situation when her contract expired and they are irrelevant. Nevertheless, the Organisation says that she still has to sign and return her first report after the one covering her probationary period. Second and third reports for the periods 1 December 1995 to 31 December 1997 and 1 January 1998 to 31 May 1998 (in French) were sent to the complainant. Her lawyer requested a translation which was refused as the complainant's knowledge of French was very good. In view of her refusal to return these reports, they were sent to the President for decision in accordance with the reporting procedure.

16. Since the Vice-President of DG5 did not have the authority to offer the complainant assurances of permanent employment, any alleged comments the Vice-President may have made to the complainant's husband in this connection are irrelevant. Nor did the complainant refer to the alleged promise when offered the five-year contract and she subsequently failed to lodge an internal appeal based on the Vice-President's alleged assurances. The Tribunal will not therefore order a hearing of the complainant's husband.

17. The Tribunal holds that the complainant has not proved that any binding promise about permanent employment for her was made before she took up service with the Organisation in 1991. She signed the contract in 1993 knowing it was a fixed-term contract and without mentioning any "promise". It is not true that the position was advertised in the *Gazette* (11/93) as a permanent post as she alleges.

18. The complainant was informed there were doubts about the future of the post with the new Team. Therefore, there was a legitimate reason for the Organisation to offer her a fixed-term contract (Article 1(2) of the Conditions of Employment of Contract Staff).

19. The allocation of duties to her following dissolution of the Team was a matter for the Administration. When they did not fully occupy her time, she was given ad hoc duties. There is no proof that the aim was to "undermine" the complainant's position in any way.

20. As to the staff members who got permanent employment, the Tribunal accepts the assessment by the Administration that their tasks proved permanent whereas the tasks performed by the complainant largely disappeared when the Team was dissolved. Given those circumstances, there was no discrimination.

21. The question of the staff reports raised by the complainant is irrelevant. The failure to renew her contract was not because she was incompetent but because there were no permanent duties for her.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SEVENTH SESSION

In re **Boivin**

Judgment 1870

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Philip Gustaaf Louise Boivin against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 13 July 1998, Eurocontrol's reply of 23 October, the complainant's rejoinder of 26 November 1998 and the Agency's surrejoinder of 5 March 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is of dual Belgian and French nationality and was born in 1966, applied for the post of head of Accounts Payable at the Directorate of Finance in Brussels, the headquarters of the Organisation. His application for the post did not succeed, but he was appointed, as of 1 September 1995, to a post as an expert at the Institute of Air Navigation Services in Luxembourg, for which there had been no notice of competition. Mr Jean Guillaume Bodar, also an unsuccessful internal candidate for the post of head of Accounts Payable, challenged the above appointment. On 4 March 1996, the Director of Human Resources communicated to the complainant the decision of the Director General to cancel his nomination as of 31 August 1996.

On 1 March 1996, Eurocontrol issued a notice of competition No. LX-96-AA/022 to fill the post of head of the Accountancy and

Personnel Office in Luxembourg. The complainant submitted an application as an internal candidate on 26 March and as an external candidate on 23 April. Not finding it possible to categorise his candidature, the Selection Board included the complainant's name in the list of suitable candidates as both an internal and an external candidate. Subsequently, the Legal Service Department deemed that he should be considered as an external candidate. The complainant was selected and, by a letter of engagement of 19 July 1996, the Director of Human Resources requested him to take up his duties on 1 August, although the complainant requested and obtained the deferral of his entry into service until 1 September 1996.

In view of the period of service already completed at the Agency, the complainant was dispensed with the probationary period and 1 September 1995 was considered as the effective date for the purposes of pension entitlements and seniority in grade.

In the meantime, the complainant had lodged an internal complaint on 28 March 1996 against the cancellation of his nomination. In view of the outcome of the above competition, no action was taken to follow up that complaint.

Mr Bodar had also applied for the post of head of the Accountancy and Personnel Office. He was informed by a letter of 31 May 1996 of the rejection of his candidature and filed an internal complaint on 4 September against the appointment of Mr Boivin. The implicit rejection of this complaint was set aside by the Tribunal on the grounds that it had not been referred to the Joint Committee for Disputes: see Judgment 1768 (*in re* Bodar). The Tribunal invited Eurocontrol, in its reply on the case, to give Mr Boivin the opportunity to express his point of view. Mr Boivin used the services of a legal counsel, who submitted comments supported by an expert opinion from a graphologist contending that Mr Bodar had falsified documents.

On 2 September 1997, Mr Boivin requested Eurocontrol to reimburse him the costs incurred in the Bodar case and to pay him 100,000 ECUs in moral damages. The Director General rejected his claim by a letter of 25 September, against which the complainant lodged an internal complaint on 18 December 1997. The Joint Committee for Disputes heard the complainant on 1 April 1998 and issued its opinion on 16 April. It recommended the rejection of that complaint but suggested that the Director General might compensate the complainant, as an entirely discretionary measure, for the stress under which he had been placed. On 13 July 1998, the complainant lodged the present complaint against the implicit decision to reject his internal complaint. By a letter dated 16 July 1998, the Director of Human Resources informed the complainant of the opinion of the Joint Committee. He explained that a definitive response would be made to his internal complaint once the Organisation had received the text of Judgment 1768, delivered in public on 9 July 1998.

B. The complainant accuses the Agency of falling short of its obligations to assist and inform him and respect his dignity. He also accuses the Agency of vexatious measures, misuse of power, discriminatory treatment, the violation of his rights under the regulations and of breaching the principles of legitimate trust and good management. Citing the case law of the Tribunal, he contends that the Agency had an obligation to compensate him for the injury caused by the cancellation of his first nomination.

He argues that Mr Bodar acted on behalf of another staff member of Eurocontrol who had been transferred and wished to return to a post in Luxembourg. He accuses the Agency of collusion with Mr Bodar. He says that the Director of Human Resources made every effort to remove him in the interests of the third staff member in order to bring an end to the complaints which had been filed following the restructuring of the Institute in 1995. The negligence of the Agency in its defence in the Bodar case and its slowness in examining the written submissions obliged him to have recourse to legal counsel and a graphologist. He submits that the Agency must be held responsible for the moral and material injury suffered by his family and the resulting anxiety.

In support of his claims, the complainant asks for several staff members of the Institute to be heard. He asks for the impugned decision to be quashed; for 183,224 Luxembourg francs with interest for the costs incurred in "his defence" in the Bodar case; for 100,000 ECUs for moral injury and 150,000 Luxembourg francs in costs.

C. In its reply, Eurocontrol admits that the complainant has been subjected to "particular stress" in recent years, but denies having failed in its obligations. It emphasises that the complainant provides no proof of his allegations, some of which are defamatory, and fails to demonstrate any flaw for which the Agency should be held responsible.

It submits that it did inform the complainant of the possible decision to terminate his contract and of the complaint made by Mr Bodar and recalls that it maintained the complainant in service until the outcome of the second recruitment procedure, which was organised rapidly. It adds that during the whole period the complainant received, in addition to his salary, daily allowances in compensation for his precarious status. According to the Agency, the decision to have recourse to legal counsel and an expert was a personal choice of the complainant the cost of which he must bear while the moral and material injury which he claims to have suffered is not the fault of the Agency, but is a result of the inappropriate attitude that he adopted in the difficult situation which he faced.

D. In his rejoinder, the complainant indicates that, by a decision dated 11 November 1998, the Director of Human Resources, on the instructions of the Director General, cancelled his second nomination on the basis of a "procedural error". In his view, this is additional proof that the Agency deliberately committed such errors so that it could dismiss him. He insists that witnesses should be heard to prove certain facts. He submits that the daily allowances which he received were in compensation for the costs incurred by his precarious status and not the injury suffered. Finally, he reproaches the Agency for not having undertaken "a disciplinary investigation" against Mr Bodar, even though it admitted in its surrejoinder to the latter's complaint that he was guilty of falsifying documents.

E. In its surrejoinder, the defendant contends that the decision of 11 November 1998 is not material to the present case and cannot be taken into account by the Tribunal. It states that it was obliged to cancel the complainant's first nomination, but that it has compensated him for any injury. It submits that the financial risk incurred by the "prolongation of the period of uncertainty ... regarding his professional future" was amply covered by the maintenance of the daily allowances and that the complainant is endeavouring to take financial advantage of the events. Finally, it considers that he is in no position to comment on the veracity of the accusations of falsifying documents, on which the Tribunal was silent.

CONSIDERATIONS

The principal facts

1. This case is related to the facts examined by the Tribunal in Judgment 1768 (*in re* Bodar), delivered on 9 July 1998. It is not, however, the direct consequence of that case, since the implicit rejection of Mr. Boivin's internal complaint was prior to the date of that judgment and the present complaint to the Tribunal was filed before Mr. Boivin knew the outcome of Mr. Bodar's complaint.

2. On 20 March 1995, Eurocontrol put up for competition a post of head of Accounts Payable at its headquarters in Brussels. Mr. Boivin was among the applicants, but was not selected for the post. Shortly afterwards, a post requiring similar skills also became available at the Institute of Air Navigation Services in Luxembourg. Eurocontrol did not consider it necessary to issue another notice of competition for this post, since there was a reserve list of candidates from the selection process for the Brussels post. After a new examination of the applicants, the recruitment of Mr. Boivin was recommended. In a letter of 6 September 1995 he was appointed to the post at grade A7, step 1, for a period of five years with effect from 1 September 1995, subject to confirmation after a probationary period of nine months. On 30 November 1995, Mr. Bodar lodged an internal complaint against this appointment, alleging several procedural flaws, and particularly the failure to issue a notice of competition. Deeming the pleas well-founded, the Agency decided to allow the internal complaint and set aside the appointment. Mr. Boivin was informed of the decision on 4 March 1996 by a letter from the Director of Human Resources; the reasons for that decision had been communicated to him verbally. Without being confirmed in a post, Mr. Boivin remained temporarily on the staff of

the Agency, without prejudice to his remuneration. He also retained the possibility of entering the competition for the post. Mr. Boivin challenged the decision, but his complaint lost all cause of action when he was reappointed.

3. Mr. Boivin submitted his application under the new competition procedure. He was selected and was appointed on 1 September 1996. Mr. Bodar lodged an internal complaint against that decision, which was implicitly rejected. He then filed a complaint with the Tribunal. Among other pleas, Mr. Bodar contended that the matter had not been referred to the Joint Committee for Disputes. In Judgment 1768, the Tribunal upheld the plea and ordered the procedure to be recommenced from the time at which the breach of due process had occurred.

4. While the case was before the Tribunal, Mr. Boivin successively consulted two lawyers to submit evidence to the Tribunal in his capacity as an interested third party.

On 2 September 1997, under the terms of Article 92, paragraph 1, of the Staff Regulations, Mr. Boivin sought from Eurocontrol: (1) reimbursement of his legal costs (for the case before the Tribunal), consisting of the amounts of 78,000 and 16,595 Luxembourg francs for the cost of legal counsel and of an expert respectively; and (2) an award of 100,000 ECUs in compensation for moral injury, because he had subsequently learnt that the first cancellation of his appointment had been "at the instigation of two Eurocontrol officials". The internal complaint was rejected by the Director General on 25 September. The complainant lodged an internal complaint against that decision on 18 December 1997, in which he pressed the same claims, except for the fact that the costs of legal counsel had then risen to 83,000 Luxembourg francs. At a meeting on 1 April 1998 the Joint Committee heard the complainant and issued its opinion on 16 April. It admitted that there had been a procedural flaw attributable to Eurocontrol in the first appointment; that the Agency's subsequent reaction had been appropriate, since it had reacted rapidly; that the complainant had suffered a period of hardship, but not over a long period. There was no evidence that the Agency had endeavoured to prejudice the second appointment and the Agency appeared to have taken normal steps to defend its decision and the interests of Mr. Boivin. In view of what had happened previously, it was nevertheless understandable that he had wished to make use of the services of a legal counsel. The Joint Committee recommended dismissing the complaint. However, since the new procedure had been arduous for the complainant, it advised that compensation be awarded to him for the stress caused by a situation which had lasted intermittently from the end of January 1996, when he was informed of the first internal complaint, until mid-July 1996, when the second appointment was announced, and from the beginning of June 1997, when he became aware of the complaint lodged by Mr. Bodar, until July 1998, the date of delivery of the judgment. On 16 July 1998, the Director General made it known that he would reach a decision once he had received a copy of the Tribunal's judgment.

By that time, Mr. Boivin had already filed the present complaint with the Tribunal. In it, he challenged the implicit decision to reject his internal complaint and pressed the same pleas. He added that he had filed a second complaint concerning "compensation for other prejudicial acts" and invited the Tribunal to rule on whether the two cases should be joined.

5. The Agency claims the present complaint should be dismissed. It does not comment on the question of joining the two cases. Conforming to requirements established by precedent, it took the necessary measures to protect the complainant from any prejudice. In its surrejoinder, it cites its letter of 16 July 1998, in which it informed the complainant that it preferred "to await the judgment of the ILOAT of 9 July 1998 in order to respond to his complaint in a global and definitive manner".

Receivability and object of the complaint

6. The dispute was submitted to the Tribunal in an unusual manner, which does not allow it to make a global ruling on all the consequences of the dispute between the parties, as would have been desirable in their common interests. Instead, with regard to material damages, compensation is only sought under certain heads (cost of legal counsel, cost of expert opinion), while the complainant claimed additional costs in a second complaint to the Tribunal which is not yet ready to be judged. Moreover,

the present complaint was filed before the complainant knew the result of Judgment 1768. In contrast, the claim for moral damages is not tied to the terms of that judgment.

By referring in this present case to the outcome of Judgment 1768, the parties have implicitly admitted that the Tribunal may take that case into account. In this respect, the requirement that internal remedies be exhausted has therefore been respected, thereby allowing the Tribunal to base its decision on the outcome of that judgment in respect of material damages (cost of legal counsel and the expert opinion) and compensation for moral injury.

However, there is no similar agreement on his second claim, for damages, which is outside the scope of the present case. The same applies to compensation for any future damage.

The Agency also rightly considers that, as a result of Judgment 1768, the complainant is no longer bound by his implicit decision not to challenge the cancellation of his first appointment, since his second appointment is no longer definitive.

The complainant's version of the causes of the dispute and the calling of witnesses

7. The complainant suspects that the origins of the dispute lie in a collusion between Mr. Bodar and another staff member designed to enable the latter to obtain the post to which the complainant was appointed.

There is no serious proof to support this claim, at least as regards the participation of the Agency in such collusion. Indeed, the Agency has on several occasions shown its desire to appoint Mr. Boivin. The evidence shows that the procedural flaws it committed were the result of negligence, since the Agency had no interest in creating grounds for the cancellation of the decision. The other official was transferred to Brétigny-sur-Orge in the context of the restructuring of the Luxembourg Institute, because the Agency did not have a post in Luxembourg suited to his profile (see on this subject Judgments 1615, *in re* Boland No. 9 and others; 1685 *in re* Boland

No. 10; 1686 *in re* Molloy No. 4; and 1757 *in re* Hardy No. 4). In Mr. Bodar's case examined by the Tribunal, the Agency also contested his pleas.

There are therefore no grounds for ordering measures of investigation into any collusion. Moreover, since the written submissions are sufficient in themselves, the hearing of witnesses is superfluous.

The merits

8. The only material issue in the dispute is to determine, for the appointed official, the consequences of the two illegal decisions concerning his appointment, resulting from procedural flaws imputable to the Agency.

According to precedent, the quashing of an official's appointment by reason of the action of another official results in the obligation for the Organisation to protect the official from any injury he may suffer from the setting aside of a decision which he has accepted in good faith (see Judgment 1359, *in re* Cassaignau No. 4).

9. In the material case, the Agency protected the complainant against any loss of income by granting him remuneration equivalent to that which he would have earned as an official confirmed in his post. In this regard, he suffered no material damage.

The costs for legal counsel and an expert opinion were incurred by the complainant as a preventive measure to defend his position in the case concerning the cancellation of his second appointment. However, costs cannot be claimed unless they are costs which the official had good reason to believe necessary for the sound defence of his cause. As regards the costs of legal counsel, he was right in principle because, after the cancellation of his first appointment and the new claims pressed by Mr. Bodar, he could have serious reasons for fearing a further cancellation, despite the reasons put forward by the Agency. However, the complainant has not justified the need to change legal counsel. The complainant also seeks reimbursement of the costs incurred in consulting an expert in graphology to prove that the letter of 31 May 1996 had been received by Mr. Bodar on 3 June, and not on 8 June 1996. But the Tribunal has found the point to be immaterial, because Mr. Bodar had in any event acted in time (see Judgment 1768 under 4). Although the present complainant could not be sure in advance of this ruling, the steps he took were not necessary since, when expert opinion is required, it is for the Tribunal to order it on its own motion or on the application of another party (Article 11 of the Rules of the Tribunal). Mr. Boivin should therefore have confined himself to submitting the question to the Tribunal, which would have judged the pertinence of the matter and the validity of the proof supplied. The costs which he incurred in obtaining an extra-judicial expert opinion, which cannot replace a judicial expert opinion, were not therefore necessary.

10. The Agency opposes compensation for moral injury. It contends that it committed no fault and minimised the harm suffered by the complainant. But it is mistaken.

According to the case law, where the impugned decision is not unlawful, compensation is due only in exceptional circumstances, such as where the wrong is especially grave. On the other hand, where the decision is unlawful, the injury suffered need not be especially grave for moral damages to be awarded: it is enough for it to be serious (see Judgment 447, *in re* Quiñones under 11).

In the present case, the two flaws relating to the appointment of Mr. Boivin are imputable primarily to the negligence of the Agency: on the first occasion, the omission to publish the notice of competition and, on the second occasion, the failure to refer the matter to the Joint Committee for Disputes.

The personal interests of the complainant have therefore clearly been harmed and there is no reason to doubt the indications provided by him concerning the stress occasioned by these decisions. The prejudice is grave in view of the duration of the uncertainty in which he was placed concerning the stability of his employment. This uncertainty commenced when Mr. Bodar challenged the first decision (the end of November 1995) and has not entirely ceased since. It will only come to an end when a definitive decision is taken concerning his application. Even though the stress claimed by the complainant probably has various causes, the prejudice is in any case partly attributable to the administrative flaws committed by the Agency.

Adequate compensation is required. It is of little import in this regard that the Agency did not act in bad faith with the intention of harming the complainant.

The complainant is entitled to compensation of 8,000 euros in moral damages and the prejudice under all heads covered by the present complaint.

11. The complaint is allowed and the complainant is entitled to costs, which are set at 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Agency shall pay the complainant 8,000 euros in damages and compensation for moral injury, under all heads, subject to the findings in 6.
3. The Agency shall pay the complainant 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SEVENTH SESSION

***In re* Coates (Nos. 1 & 2)**

Judgment 1871

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr David Coates against the Food and Agriculture Organization of the United Nations (FAO) on 23 December 1996 and corrected on 7 February 1997, the FAO's reply of 21 May, the complainant's rejoinder of 18 December 1998 and the Organization's surrejoinder of 17 March 1999;

Considering the second complaint filed by Mr David Coates against the FAO on 24 November 1998 and corrected on 18 December 1998, the FAO's reply of 16 March 1999 and the complainant's letter of 13 April 1999 informing the Registrar that he did not wish to enter a rejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is British and was born in 1952, joined the staff of the FAO in February 1987 as technical adviser at grade P.4 in a project to enhance fish stocks in Papua New Guinea. His last contract, which was due to expire on 28 February 1997, was extended until 31 March 1997. The last grade he held was P.5.

In a special bulletin on FAO restructuring, dated December 1994, the Field Staff Association indicated that the Director-General's recruitment policy favoured candidates from non-represented or under-represented countries and that, until these objectives were achieved, the chances of field staff coming from other member States being selected for regular programme posts in the FAO were very slim. A list was annexed of non-represented and under-represented countries. Germany was included in the second category.

By a letter of 13 July 1995 the complainant applied for a post as Fishery Resources Officer (Inland Fisheries) at grade P.4. The contract was for three years at headquarters in the Fishery Resources Division of the Fisheries Department. In his application for the vacancy, the complainant indicated that he was of British nationality, but that he wished to acquire the nationality of Papua New Guinea, for which purpose he had taken the appropriate steps in December 1994. The post in question was officially published in a vacancy announcement of 15 September 1995.

On 18 January 1996 an official responsible for the Fishery Resources Division completed the document for the submission of a short list of four candidates to the Professional Staff Selection Committee. The complainant was placed first and an applicant of German nationality, Mr Gerd Marmulla, was last on the short list. On 14 February, the Committee finalised the document by adding its recommendations: it confirmed the list, but modified the order of preference by giving second place to Mr Marmulla.

By a telex dated 19 January 1996 the Senior Fishery Resources Officer requested the complainant to clarify his nationality status. He replied, by a letter dated 24 January, that he was still British and that his application to the Government of Papua New Guinea was still pending.

In a memorandum dated 11 April the Director-General asked the heads of department and offices and the regional and subregional representatives to ensure that every effort was made to identify candidates from non-represented and under-represented countries and that they were seriously considered for each vacancy.

Following an exchange of correspondence between the Administration and the complainant, the latter learnt that his application had been rejected in favour of the German candidate.

By a letter of 6 June the complainant requested the Senior Fishery Resources Officer to provide him with a written explanation of the circumstances leading to his failure to be selected and to place a copy of this document in his personnel file. In a letter of 13 June the secretary of the Field Staff Association replied that, in view of the confidentiality of the procedures, it was not possible to provide him with the explanations that he had requested. In another letter, also dated 13 June, the Personnel Officer of the Fisheries Department stated that his application had been rejected, but that no record of it would be kept in his personnel file.

By a letter of 8 August 1996 the complainant appealed to the above Personnel Officer against the decision not to select him for the post awarded to Mr Marmulla. Not having received a reply, he filed his first complaint on 23 December 1996.

By a letter of 3 January 1997 he appealed to the Director-General. In a letter dated 4 March the Assistant Director-General in charge of Administration and Finance informed him that his appeal had been dismissed.

On 1 May 1997 the complainant brought his case to the Appeals Committee, which issued its report on 9 June 1998. By a letter dated 26 August the Director-General transmitted to the complainant a copy of this report, in which the Appeals Committee accepted that the appeal was receivable, but recommended its dismissal. He informed the complainant that he had decided to accept this recommendation. The complainant challenges that decision in his second complaint, filed on 24 November 1998.

B. In his first complaint, the complainant explains that his complaint is receivable, in accordance with Article VII(3) of the Statute of the Tribunal, since the Administration had not taken a decision on the appeal that he lodged on 8 August 1996.

He submits that the rejection of his application is an unlawful decision. In accordance with the case law of the Tribunal, the successful applicant must have all the minimum qualifications required in the notice of vacancy. He observes that, in contrast with Mr Marmulla, his own qualifications were higher than those required in the vacancy announcement.

Citing various texts, he contends that, although the Director-General has discretionary power concerning the appointment of staff members, he has to make his choice on the basis of the qualifications of the applicants and has to give priority to staff members of the Organization. Although the principle of equitable geographic distribution admittedly has to be taken into account, it is only of a "subsidiary nature".

The Professional Staff Selection Committee, as well as the members of the Fishery Resources Division, had recognised that he was the best candidate for the post. In his view, the Director-General took his decision solely on the basis of the nationality of the candidates. He alleges that the impugned decision violates the principle of equal treatment because it was founded on discrimination on the ground of nationality.

The complainant asks the Tribunal to order the Organization to pay him an amount equivalent to three years' salary and his statutory entitlements, as well as compensation for the moral injury that he suffered and "costs to cover legal expenses and allied expenses arising from geographical separation".

In his second complaint, the complainant presses his pleas and asks for the two cases to be joined.

He reiterates his pleas, and particularly that the rejection of his application is an unlawful decision. Citing the FAO Manual, he adds that, where several candidates are equally well qualified, the criterion of seniority prevails over that of nationality. The order of selection criteria is "extremely clear" and is confirmed by the vacancy announcement, which only refers to qualifications and experience. In the material case, he considers that the Director-General abused his power by selecting Mr Marmulla.

C. In its reply to the first complaint, the FAO submits that the complaint is irreceivable. It explains that the letter of 8 August 1996 never reached the Personnel Officer of the Fisheries Department, and so it could not be treated as an appeal by the complainant. It adds that the complainant did not appeal to the Director-General until 3 January 1997, which was over seven months after he had been notified of the decision not to select him, and that he was therefore time-barred. Moreover, he had not exhausted the internal remedies.

Subsidiarily, it observes that the principle of geographic distribution is "enshrined" in Article VIII of the Constitution and FAO Manual paragraph 305.433.

It contends that the references made by the complainant to the case law are not relevant to the present case, because it respected its selection criteria and the Selection Committee and the Fisheries Department considered that the selected candidate had the required qualifications. It adds that the Tribunal recognises the possibility for organisations to determine quotas "for recruitment for the purpose of preserving or developing the international character of the staff" (Judgment 551 *in re* Spangenberg).

In its reply to the second complaint, the FAO does not oppose the joining of the two cases and presses its subsidiary pleas.

D. In his rejoinder, the complainant affirms that he provided proof of the transmission of the letter of 8 August 1996, by which he lodged his appeal.

He says that, by declaring his first appeal receivable, the Director-General implicitly recognised that it was well-founded and that he was justified in having recourse to the Tribunal. The FAO should therefore pay him costs.

E. In its surrejoinder, the FAO further submits that, by appealing to the Director-General after he had filed his complaint with the Tribunal, the complainant demonstrated his awareness that he had not exhausted the internal procedures, as required. It therefore opposes the payment of costs incurred by the first complaint on the grounds that it was filed before the complainant had exhausted his internal means of redress.

CONSIDERATIONS

1. In his first complaint, dated 23 December 1996, the complainant, invoking Article VII(3) of the Statute of the Tribunal, challenges what he considers to be an implicit rejection of his appeal by the FAO. In his second complaint, he challenges the explicit rejection of the appeal.

The FAO submits that the first complaint is irreceivable.

As the complainant requested the joinder of the two cases and the FAO did not raise objections to it, the cases are joined and there is therefore no need to deal with the question of receivability of the first complaint. The second complaint is receivable and the Tribunal will examine the case on its merits.

2. The complainant joined the staff of the FAO in February 1987 as technical adviser for a project executed by the Fisheries Department in Papua New Guinea. His fixed-term contract was renewed on several occasions, the last one was extended to 31 March 1997. He had been promoted to grade P.5 in 1991.

3. On 13 July 1995, he applied for a post as Fishery Resources Officer at grade P.4 in the Fisheries Department at FAO headquarters.

From the ninety-seven applications received for the post, the Fisheries Department submitted the names of four applicants, classified by order of preference, to the Professional Staff Selection Committee. The complainant was placed first on the list.

In its report to the Director-General, the Selection Committee confirmed the choices made by the Fisheries Department, but changed the order of preference: the fourth-placed applicant was raised to the second place, while the complainant remained in first place.

4. On 10 May 1996, when examining the Selection Committee's report, the Director-General gave his preference to the second-placed applicant on the grounds that he was a national of a country which was "under-represented" on the Professional staff of the FAO, while the complainant was a national of a country with "equitable representation".

5. Considering that the choice made by the Director-General was contrary to the recommendations of the Fisheries Department and the Selection Committee, that the selection had been made on non-professional criteria and that the candidate selected was clearly less well qualified, experienced or able than himself, the complainant appealed to the Director-General on 3 January 1997.

By a letter of 4 March 1997 he was informed that his appeal had been dismissed by the Director-General.

On 1 May the complainant appealed to the chairman of the Appeals Committee. In its report to the Director-General, dated 9 June 1998, the Appeals Committee recommended that the appeal should be dismissed as being unfounded.

By a letter of 26 August 1998 the Director-General informed the complainant of the dismissal of his appeal. It is this decision which is challenged in the second complaint to the Tribunal, filed on 24 November 1998.

6. The complainant asks that the FAO be ordered to pay him an amount equivalent to three years' salary and his statutory allowances, compensation for the moral injury suffered and an amount to cover costs, including the costs of legal counsel and allied expenses arising from geographical separation.

He contends that the decision not to select him is unlawful on the grounds that the Director-General breached both the Constitution of the FAO and its General Rules and Staff Regulations, that he also misused his power and, finally, that he breached the principle of equal treatment.

7. Article VIII, paragraph 1, of the Constitution of the FAO provides that:

> "The staff of the Organization shall be appointed by the Director-General in accordance with such procedure as may be determined by rules made by the Conference."

and paragraph 3 of the same Article states that:

> "In appointing the staff, the Director-General shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of selecting personnel recruited on as wide a geographical basis as is possible."

Rule XXXIX, paragraph 1, of the General Rules provides that:

> "The staff of the Organization shall be appointed by the Director-General, having regard to paragraph 3 of Article VIII of the Constitution. Selection

> and remuneration shall be made without regard to race, nationality, creed or sex. ..."

and paragraph 4 of the same Rule states that:

> "Except as provided in paragraph 1 of this Rule, the Director-General shall act in his unfettered judgement in appointing, assigning and promoting staff personnel, and shall not be bound to accept advice or request from any other source."

Appendix A to section 305 of the FAO Manual indicates that, for appointments and promotions to posts of one year or more, the Selection Committee "recommends for selection the candidate whose qualifications and experience most closely meet the requirements of the post set out in the vacancy announcement" and that if several candidates are equally well qualified, "the order of preference for selection could be as follows:

(i) a staff member holding a continuing appointment who is without, or shortly to be without, an assignment ...;

(ii) seniority with the Organization ...;

(iii) a candidate from a country not geographically over-represented;

(iv) a staff member of another UN organization."

and Manual paragraph 305.433 states that:

> "In filling a vacancy in the Professional category at Headquarters or a regional office, priority is given to qualified candidates who are nationals of Member States 'under-represented' or 'non-represented' on the staff. The consideration of geographic distribution is also applied ..."

8. The above provisions and the case law of the Tribunal show that the Director-General has discretion with regard to the appointment of staff members, which can only be subject to a limited power of review, for example as to whether he exercised his power in accordance with the basic texts of the Organization and the general principles of law governing the international civil service.

9. The Tribunal observes that the Director-General gave paramount importance to the principle of geographic distribution, which resulted in him selecting the applicant who was second in the list recommended by the Selection Committee because that applicant was a national of an "under-

represented" country, while the complainant, who was in first place, was a national of an "equitably represented" country.

10. Analysis of the above provisions and the facts of the case show that the Director-General was mistaken in his interpretation of these provisions. The Constitution of the FAO clearly states that "the highest standards of efficiency and of technical competence" are of paramount importance in appointing staff.

The Selection Committee is under the obligation to recommend for selection the candidate whose qualifications most closely meet the requirements of the post.

Therefore the essential qualifications required are the priority criterion. Consideration of other criteria, including seniority of service and geographic distribution, which appear to be of a subsidiary nature, is only envisaged where several candidates are equally well qualified. Moreover, even in that case, "seniority with the Organization" prevails over the criterion of geographical under-representation or non-representation.

11. It is not contested that the qualifications of the complainant were considered to be more pertinent to the post than those of the other candidates, both by the Fisheries Department and the Selection Committee, which both placed him first on the list.

In addition, of the four candidates, the complainant alone could be considered to be an internal candidate with a certain seniority of service with the Organization. It must therefore be concluded that the Director-General, who assigned paramount importance to the criterion of geographic distribution, acted in breach of the applicable provisions by rejecting the complainant's application in favour of another candidate on the sole ground of nationality.

12. The complainant was therefore wrongly passed over in favour of an applicant whose qualifications were less pertinent and who had no seniority in the Organization.

The Tribunal consequently considers it fair to award the complainant the sum of 100,000 United States dollars in compensation for the injury he suffered under all heads.

DECISION

For the above reasons,

1. All the other claims having been dismissed, the FAO shall pay the complainant 100,000 United States dollars in compensation for the injury he suffered under all heads.
2. The FAO shall pay the complainant 8,000 Swiss francs in costs.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SEVENTH SESSION

In re **Banda** **Judgment 1872**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Chemuta Divy Banda against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 3 June 1998, the OPCW's reply of 10 September, the complainant's rejoinder of 16 November and the Organisation's surrejoinder of 15 December 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Cameroon who was born in 1946, joined the Provisional Technical Secretariat of the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons in August 1993 as head of the Personnel Branch on a one-year fixed-term appointment at grade P.5. His appointment was renewed several times until 23 May 1997 when the Preparatory Commission ceased to exist and its powers were transferred to the Organisation for the Prohibition of Chemical Weapons. As from 24 May 1997 he was on a three-year fixed-term appointment as head of the Organisation's Human Resources Branch. His probationary period was waived.

The protection of confidential information in the Organisation is dealt with in an annex to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Article 9 of the annex says:

> "The staff shall enter into individual secrecy agreements with the Technical Secretariat covering their period of employment and a period of five years after it is terminated."

On 22 July 1997 the Director-General realised that some eighty members of the staff had not yet signed their individual secrecy agreements. He concluded that three staff members, one of whom was the complainant, were to blame for what he deemed to be a serious breach of the "confidentiality annex". On the very same day he told the complainant that he was placing him, with immediate effect, on special leave with full pay for the duration of the procedure concerning termination of employment for unsatisfactory services that he envisaged commencing in accordance with Interim Staff Regulation 9.1. The Regulation reads as follows:

> "(a) The Director-General may terminate the appointment of a staff member prior to the expiration date of his/her contract if ... the services of the individual concerned prove unsatisfactory; ...
>
> (b) No termination under sub-paragraph (a) shall take place until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Director-General."

The complainant asked the Director-General several times to reconsider his decision.

The complainant was due for a within-step increment on 1 August 1997, but the Deputy Director-General decided to withhold it. In its report of 29 September 1997 the Special Advisory Board, having considered his service with both the Preparatory Commission until 23 May 1997 and the Organisation thereafter, unanimously recommended dismissing the complainant. The Joint Advisory Board sent that report to the Director-General on 3 October, indicating that it endorsed the conclusions of the Special Advisory Board, and emphasising that the complainant had not taken timely measures to secure staff signatures on the secrecy agreements. On 9 October the Director-General in his role as Acting Director-General sent to the complainant a copy of the report. In a letter of 16 October 1997 the Deputy Director-General in his role as Acting Director-General informed him that his appointment was to be terminated for unsatisfactory services after the statutory sixty days' notice.

By a letter of 21 November the Director-General rejected the complainant's request of 29 October for a review of that decision. On 4 December 1997 the complainant lodged his appeal with the Appeals Council. In its report of 11 March 1998 the Council considered that the evaluation of the complainant's performance should be based only on the period of service with the Organisation and not on his services with the Preparatory Commission. It concluded that he did not have enough time, between 24 May and 22 July 1997, to show improvement in his performance, particularly as he was on leave from 26 June to 13 July. It unanimously recommended that the Director-General uphold his decision to suspend the step increment but rescind the decision to dismiss him. Instead of reinstating the complainant it further recommended offering him an appropriate settlement in compensation for the premature termination of his contract. By a letter of 19 March 1998 – the impugned decision – the Director-General confirmed his dismissal.

B. The complainant submits that the impugned decision shows four procedural flaws. First, it does not give the reasons for his termination. The "incident" of the secrecy agreements was not a valid reason for termination for unsatisfactory services. Second, the report on his performance for the period 1996-97 was never completed, and in the previous reports, covering the years 1993-96, he had been given overall ratings ranging from "satisfactory" to "very good". Besides, he was taken on by the Organisation without a probationary period. Third, he was given no warning that his services were unsatisfactory. Fourth, the decision to dismiss him was taken not by the Director-General, who has sole authority for such decisions, but by the Deputy Director-General, who was the "main instigator" of the accusations against him.

The complainant further contends that the Organisation produced no evidence that his services were unsatisfactory. In any event, it would have only been possible to terminate his appointment on that ground as a last resort, if his performance was found to be unsatisfactory in two consecutive reports. Lastly, several conclusions of the Special Advisory Board were erroneous.

He asks the Tribunal: (a) to quash the impugned decision; (b) to order the payment of his step increment as from 1 August 1997 plus an allowance for inflation and interest; (c) to order the payment of his salary and all other allowances to which he would have been entitled had he not been dismissed, plus an allowance for inflation and interest; (d) to order his reinstatement retroactively from 17 December 1997 or alternatively, to award him damages equivalent to the salary and allowances to which he would have been entitled had he not been dismissed, plus an allowance for inflation and interest, as from the date of the Tribunal's judgment until 23 May 2000, the expiry date of his contract; (e) to order the reimbursement of all the expenses which he has, or will, incur as a result of the termination, plus interest; and (f) to award him 20,000 Dutch guilders in compensation for moral injury.

C. The Organisation replies that he was given the reasons for his dismissal first orally by the Director-General on 22 July 1997, and later in detail in the report of the Special Advisory Board, of which he received a copy on 9 October. It submits that the Appeals Council made a mistake of law by failing to take account of the complainant's period of service with the Preparatory Commission. If his entire period of service, from August 1993 to July 1997, is considered it is plain that he was unable to maintain good working relations and that the accusation of unsatisfactory services was based on a series of incidents. His attention was drawn in November 1996 to the issue of the signing of secrecy agreements and in March 1997 to the unsatisfactory performance of his services.

It points out that protection of the confidentiality of information is of crucial importance to member States and that the complainant's omissions impaired the Organisation's credibility. The Deputy Director-General acted under proper delegation of authority when he notified the termination to the complainant on 16 October 1997. Lastly, decisions on a staff member's performance are discretionary and subject only to limited review.

D. In his rejoinder the complainant maintains that the only reason for termination given orally by the Director-General on 22 July 1997 was the matter of the secrecy agreements, and that sending him the report of the Special Advisory Board did not remedy the initial omission. He points out that in November 1996 the Legal Division had not finished drafting the individual secrecy agreements. The memorandum of March 1997 which the

Organisation relies on to show that it did comment on his work contains no warning about a possible dismissal. He may have had disagreements about professional matters with colleagues, but that does not mean that he is incapable of maintaining good working relationships. He states that he has been used as a "scapegoat".

He submits that the secrecy agreements were not necessary to guarantee the confidentiality of information, since they merely repeat an obligation already set in Regulation 1.6 of the Interim Staff Regulations. Lastly, he objects to the way that the Organisation treated him during the appeal procedure. He reiterates and enlarges on his claims, and points out that the expenses claimed as redress under e) include legal costs.

E. In its surrejoinder the Organisation contends that it had a duty to assess the performance of staff particularly those who, like the complainant, had been exempted from probation, because the transition from the Preparatory Commission to the OPCW was driven by political considerations in which issues of geographical balance in staffing and continuity were given greater importance than performance.

The complainant was properly informed of the reasons for his dismissal and the report of the Special Advisory Board was an integral part of the notice of termination. The Human Resources Branch, not the Legal Division, was responsible for drafting the secrecy agreements. Lastly, it treated the complainant properly throughout the period of his special leave.

CONSIDERATIONS

1. The complainant, a citizen of Cameroon, joined the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons (OPCW) on 1 August 1993 and, as head of the Personnel Branch, was awarded fixed-term contracts which were renewed until 23 May 1997, when the Preparatory Commission ceased to exist and its powers were transferred to the Organisation which had just been established. The complainant was awarded a three-year contract as head of the Human Resources Branch with the Organisation, which took effect on 24 May 1997. However, on 22 July 1997, the Director-General realised that some eighty members of the staff had not signed the individual secrecy agreements to

which they were obliged to adhere. He attributed the blame for this omission to the complainant and two other staff members. The complainant was immediately suspended and a procedure was commenced for termination of employment for unsatisfactory services. His case was examined by the Special Advisory Board, which transmitted its recommendations through the Joint Advisory Board to the Director-General. On 16 October 1997, the decision was made to terminate the complainant's contract after the sixty days' notice. The complainant appealed against this decision to the Appeals Council of the Organisation, which unanimously recommended that the Director-General reverse his decision. However, this recommendation was not accepted and the decision to terminate his contract was confirmed by a letter of 19 March 1998. The complainant asks the Tribunal to quash the decision confirming the termination of his appointment and to order the Organisation to award him the step increment to which he considers he is entitled, to pay him the remuneration to which he is entitled as from 17 December 1997, to reinstate him or to award him damages equivalent to the salary and allowances to which he would have been entitled until the date of expiration of his contract, and to pay him compensation under various heads, including the moral prejudice which he says he suffered, and costs.

2. In support of his complaint, he has the following pleas: in the first place, he says that the decision to terminate his contract is tainted with serious procedural flaws. The statement of reasons for the decision was inadequate and the decision was taken as a sanction for alleged unsatisfactory services which cannot be demonstrated in the absence of a performance appraisal report for the year 1996-97. Furthermore, the decision was not preceded by the warning that case law deems necessary before any termination of employment for unsatisfactory services. The decision was not signed by the proper authority, but by someone who was prejudiced against him. In the second place, and on the merits, the complainant states that the Organisation has not discharged its burden of proving that his services were unsatisfactory and has not taken into account essential aspects of the case.

3. Before examining these pleas, it is necessary to consider the conflicting reasons for which the Special Advisory Board recommended that the Director-General should terminate the complainant's contract and the Appeals Council recommended that he reverse his decision. It is also necessary to recall the more mitigated position of the Joint Advisory Board.

4. For the Special Advisory Board, which held no less than twelve meetings on this case, the complainant's full career, both in the Preparatory Commission and in his functions as head of the Organisation's Human Resources Branch, show that his performance has been unsatisfactory. With regard to his work before 24 May 1997, the Board emphasises his unsatisfactory performance as secretary to the various bodies of the Preparatory Commission and the fact that he did not play the active role that was to be expected of him in the drafting of the Staff Regulations and Rules. As regards his work following the establishment of the OPCW, the Board notes that there were unacceptable delays in the signing of the individual secrecy agreements which endangered the confidentiality policy of the Organisation, that there was no strategy for the signing of staff employment contracts, and that the oaths of service for staff members joining OPCW from the Provisional Technical Secretariat were neglected. More generally, the Board emphasises the poor relations of the complainant with his subordinates throughout his career, and the fact that he had not developed any written procedures on how to deal with personnel problems, and had let the personnel databases become out of date, with the result that the staff member who succeeded him after his suspension found no written procedures or electronic files which could be used to deal with the issues which arose. Under these circumstances, the Board reached the conclusion that maintaining the complainant in his functions was "not in the best interests of the Organisation".

5. When it examined the case, the Appeals Council was of a radically different opinion. It noted that, according to the representative of the Director-General, neither the Technical Secretariat nor the Director-General could be held legally responsible for activities in the area of administration that were carried out by the Preparatory Commission and that, consequently, the impugned decision to terminate the complainant's

appointment could only relate to his service for the Organisation itself, that is to the period from 24 May to 22 July 1997 inclusive. In the opinion of the Appeals Council, all matters relating to the performance of the complainant for the Preparatory Commission should be excluded from the consideration of the case. Indeed, the complainant was awarded a contract for three years without a probationary period on 24 May 1997 and was on regular leave between 26 June and 13 July 1997. Moreover, he was not warned in due time that his services as head of the Human Resources Branch of the Organisation were not considered satisfactory. With the exception of an electronic mail of 22 July from the Director of the Administration Division, only an internal memorandum from the same Director, of which he became aware on his return from leave, brought precise criticisms to his attention. Therefore the complainant was not given a reasonable time to show improvement in his performance and, even if the Organisation may have been able to criticise his services as being unsatisfactory between 24 May and 22 July, it could not terminate his three-year contract without allowing him sufficient time to improve his performance.

6. Between these two extreme opinions, the Joint Advisory Board, which was responsible for transmitting to the Director-General the opinion of the Special Advisory Board, adopted an intermediary position. Although clearly concurring with the opinion of the Special Advisory Board, the Joint Advisory Board specified that, in its view, the primary consideration which should be taken into account by the Director-General was the fact that the complainant had not taken timely measures for the signing of the individual secrecy agreements, which endangered the Organisation's policy on this matter.

7. In view of the above, it is important to establish the real reasons for which the impugned decision was taken. In this regard, the complainant rightly recalls that international officials have the right to be informed, from the beginning of the procedure, of the grounds which will serve as a basis for the Administration's decision; and he is correct to emphasise that the Director-General's Administrative Directive (OPCW-TS/AD/2) of 22 July 1997 provides that, when the Director-General decides to terminate an appointment, the staff member concerned shall be given in the notice of termination "the reasons for the Director-General's decision and the

considerations, conclusions and recommendations of the special advisory board". In the material case, the decision taken on 16 October 1997 by the Deputy Director-General, acting on behalf of the Director-General in the latter's absence, does not provide detailed reasons: it notifies the complainant of the decision to terminate his appointment, while assuring him that the decision was taken "after careful consideration of all the facts, taking into account the recommendations of the Special Advisory Board established to consider this matter, and of the Joint Advisory Board." On the one hand, this decision is not based on reasoning which stands alone and, on the other hand, it refers to the recommendations of two advisory bodies which, without being contradictory, are not entirely concordant, since one invokes the whole career of the complainant for both the Preparatory Commission and the Organisation itself, while the other bases its opinion essentially on the incidents relating to the individual secrecy agreements which resulted in the complainant's suspension. Therefore, the impugned decision is tainted by a flaw which cannot be attenuated by the fact that the complainant was informed on 22 July 1997 of the reasons for which the Organisation had set in motion the procedure for the termination of his appointment.

8. In practice, this procedural flaw reveals an ambiguity in the Administration's position. Because it did not have recourse to a disciplinary procedure, which would not have been inconceivable in the present case, the Organisation constantly hesitated between challenging the complainant's professional capacities throughout his career since 1993 and criticising his performance as from 24 May 1997. However, even supposing that his performance for the Preparatory Commission could legally have been taken into account, the written submissions, and in particular the performance appraisal reports of 1 September 1994, 31 July 1995 and 31 July 1996, shows that, despite certain serious criticisms, the overall appraisals of the complainant's performance were never "unsatisfactory" and that, for the period July 1994 to July 1995, they were even "very good". As a result of these reports, and in accordance with their conclusions, the complainant's contract was renewed each year with a step increment. Moreover, at the time that the Organisation itself was established, he was awarded a three-year contract without a probationary period. Up to 24 May 1997, the

complainant's performance for the Organisation's predecessor body was therefore considered to be satisfactory, even though certain incidents had been noted.

9. It must therefore be deduced from the above that, as indicated by the Joint Advisory Board, it was the performance of the complainant from 24 May 1997 which was taken into account by the Director-General. Serious malfunctioning problems were rightly noted. However, since the procedure that was instigated was not a disciplinary one, but a procedure for the termination of the complainant's appointment for unsatisfactory service, the complainant needed to be informed in due time, either through a negative performance appraisal report, or through precise warnings, that the Organisation was not satisfied with his performance and that if he did not improve it his appointment would be terminated: see, for example, Judgment 1484 (*in re* Thuillier). But the performance appraisal report for the period 1996-97 was never completed and the only criticisms concerning unsatisfactory service which could be levelled against him, which related to the signing of contracts of employment and individual secrecy agreements, were made on 22 July 1997, the very day of his suspension. On that date, no further opportunity was available to him to show that he was capable of improving his performance. On this point, the Organisation can admittedly invoke the internal memorandum sent by the Director of the Administration Division on 1 July 1997 to the complainant, who became aware of it on his return from leave on 13 July. Although the general tone of the memorandum was critical, it did not contain any warning permitting the complainant to believe that his professional competence was being challenged less than two months after his appointment for three years.

10. As a result of the above considerations, without it being necessary to examine the other pleas put forward in the complaint, the impugned decision must be set aside because it did not provide the complainant with the guarantees that are due to international officials threatened with the termination of their appointment for unsatisfactory service. The Tribunal considers that, in the material case, there is no reason to order the reinstatement of the complainant, nor to set aside the decision to withhold a step increment as of 1 August 1997. The prejudice suffered by the

complainant due to the unlawful termination of his appointment will be made up by the payment of compensation equivalent to the salary and various benefits that he would have received from the date of the termination of his appointment until the expiration of his contract, namely up to 23 May 2000. This compensation, including full interest up to the date of the present Judgment, will provide compensation for all the material and moral injury claimed by the complainant.

11. The complainant is entitled to the payment of 6,000 euros in costs.

DECISION

For the above reasons,

1. The decision of the Director-General of the OPCW, dated 16 October 1997 and confirmed on 19 March 1998, is set aside.
2. The Organisation shall pay the complainant an amount equal to the salary and benefits that he would have received had he remained in service at his grade and step between the date of the termination of his appointment and 23 May 2000.
3. The Organisation shall pay the complainant 6,000 Euros in costs.
4. The other claims are dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SEVENTH SESSION

***In re* Amira (No. 2)**
(Application for execution)

Judgment 1873

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for the execution of Judgment 1317 filed by Mr Charles Mbagaya Amira on 29 May 1998 and corrected on 14 September, the reply of 21 December 1998 from the International Telecommunication Union (ITU), the complainant's rejoinder of 12 February 1999 and the Union's waiver of its right to submit a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. By Judgment 1317 of 31 January 1994 the Tribunal set aside a decision whereby the Secretary-General of the ITU refused to renew the complainant's appointment as Senior Regional Representative for Africa. It ordered the organisation to pay him damages in an amount equivalent to three years' salary and allowances less any occupational earnings he might have had since 30 September 1990.

Though the Union immediately made over the 5,000 Swiss francs that the Tribunal had awarded him in costs, it was slow to settle the damages. The complainant attributes the delay to reluctance on the part of the organisation, and the ITU to the time it took the complainant to provide the information it needed in order to work out his occupational earnings, which it was to deduct from the amount of the damages. Thus, although the complainant received an initial sum of 70,000 United States dollars on 6 June 1994 and a further 8,000 dollars in November 1996, he had to wait until 29 May 1998 before receiving an additional 50,000 dollars and until 4 August 1998 for a further 84,374 dollars which, according to the Union, was the remainder of what it owed him. Such were the circumstances in which he applied to the Tribunal for execution of Judgment 1317. He accuses the Union of calculating the amount of the indemnity wrongly and of tardiness in paying it. He asks the Tribunal to award him various amounts in further damages.

The amount of the damages

2. He contends that the total amount the Union paid him is not in keeping with Judgment 1317, of which he claims full execution. For one thing there was a mistake in the calculation of his earnings from the Organization of African Unity (OAU). For another, the Union failed to deduct from his occupational earnings the expenses he had incurred in acquiring them. Furthermore, in reckoning the three years' salary and allowances, it should have counted allowances such as the education and travel grants for his children and an allowance he used to get for use of his private car when he was serving in Addis Ababa.

3. He is right in alleging that there was a mistake in the calculation of his earnings from consultancy work for the OAU. He himself said that they amounted to 11,625 dollars. But that was for the contract period from 13 January to 24 February 1994, whereas the period that the Tribunal set for calculating the damages ended on 31 January 1994.

The ITU should therefore have deducted 3,375 dollars, not 11,625 dollars, from the amount it was to pay him, so he is entitled to a further 8,250 dollars. The Union does not deny that this is so, though it submits that the mistake was not of its own making but a consequence of the inaccurate and inconsistent information he supplied.

4. Citing Judgment 1748 of 9 July 1998 (*in re* Limage No. 2) the complainant argues that in reckoning his occupational earnings from 1991 to 1994 the Union should have counted the expenses he incurred in earning that money. But his position is very different from that of the complainant in Judgment 1748. There is obviously no reason why the ITU should pay transport and subsistence costs he incurred while under contract to other international organisations. Besides, he made no such claim before coming to the Tribunal.

5. The question of which allowances may be included in the damages owed to him is less straightforward. The Union took as the basis for calculation his last monthly salary, without deductions for pension and insurance, and multiplied it by thirty-six as Judgment 1317 required. It worked out the monthly salary as being 7,340.75 dollars including family allowance but excluding the education grant.

By 24 May 1994 the complainant had noted the Union's calculation, reserved his rights with regard to inclusion of the education grant, which he says is due to him under Regulation 3.11 of the ITU Staff Regulations, and to interest for late payment.

6. Paragraph 2 a) of Staff Regulation 3.11, which is about the education grant, reads:

> "an education grant shall be available to an internationally recruited staff member who is serving outside the country of which he is a national according to Regulation 4.6 and whose child is in full-time attendance at a school, university, or similar educational institution of a type which will, in the opinion of the Secretary-General, facilitate the child's resettlement in the staff member's recognized home country. ..."

Thus, to qualify for the grant a staff member must be actually employed in a country other than his own. Although the termination of the complainant's appointment was attributable to a decision not to renew it which the Tribunal deemed unlawful, it is nonetheless a fact that he did not actually serve in a country other than his own after his contract expired. So the ITU cannot be required to pay for an education which would in no way facilitate his children's resettlement in their home country. Even if he had been entitled to the grant had it kept him on, his claim would in any event have been disallowed.

7. The same argument holds good for his claim to the inclusion of the monthly allowance of 50 dollars he got for using his own car because he was not provided with an official vehicle. That allowance too obviously depended on his actually serving in Addis Ababa and no longer applied after he returned to his country of origin.

8. As for his claims to the other allowances listed at the end of the complaint - some of which the ITU did include - he produces no arguments in support of them which could convince the Tribunal. The conclusion is that, apart from the mistake noted in 3 above, which it must set right, the

Union's calculation of the amount of the damages was fully consistent with the judgment it was required to execute.

The delay in executing Judgment 1317

9. The ITU was very tardy in meeting its obligations. Not until 1998, in two payments of 29 May and 4 August, did it pay the complainant the 134,374 dollars it still owed him in damages. Up until then it had made over only 78,000 dollars, in May 1994 and November 1996. Yet the judgment ordering the payment was delivered on 31 January 1994.

10. The ITU is largely to blame for the excessive delay. On 19 May 1994 the complainant sent the Union an affidavit in which he stated on oath that his only occupational earnings during the period in question were from his work for the Economic Commission for Africa and the OAU. On 24 May 1994 his counsel informed the Union that, since he had complied with its request of 2 May 1994, in particular by producing the affidavit it had asked for, it must pay what it owed him at once, otherwise he would claim interest for late payments. In a letter of 2 June 1994 followed by another of 7 June, in answer to a further request for information and documents, his counsel again said that she saw no reason for the Union to require further proof of negative facts, that the documents would be produced if necessary but that it would take time and that the interest on the amounts due would continue to run. Nothing in the documents which were then produced, including the certificates of 8 March 1996 and 21 May 1998 from the Kenyan tax authorities, contradicted the complainant's original statements. Furthermore, after the complainant produced convincing evidence on 24 October 1996, the Union preferred to seek guidance from the President of the Tribunal in an application that the Tribunal was unable to entertain, thereby prolonging the process only to accept the evidence in the end.

11. In these circumstances, the Tribunal considers that the Union is responsible for its delay in executing the judgment of 31 January 1994, since it failed to make the last payments until 29 May and 4 August 1998, after more than four years of procedures which proved pointless since in the end it accepted the complainant's calculations for the most part. The delay caused the complainant injury for which he is entitled to redress, and the Tribunal awards him a lump sum of 50,000 dollars. That award being relief for all forms of injury, there is no need to entertain his many other claims.

12. Since his application largely succeeds, he is also entitled to an award of costs which the Tribunal sets at 10,000 Swiss francs.

DECISION

For the above reasons,

1. The ITU shall pay the complainant further damages in an amount of 8,250 United States dollars for the mistake in calculation referred to under 3 above.
2. It shall pay him 50,000 dollars in compensation for the injury it caused him by its delay in executing Judgment 1317.
3. It shall pay him 10,000 Swiss francs in costs.
4. His other claims are dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SEVENTH SESSION

In re **Mshana** **Judgment 1874**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Lucy Eutropia Mshana against the World Health Organization (WHO) on 21 April 1998, the WHO's reply of 23 July, the complainant's rejoinder of 30 October 1998, and the Organization's surrejoinder of 1 February 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Tanzanian who was born in 1957, joined the staff of the WHO on 16 January 1984 as a secretary, grade SAS.07, in the Regional Health Development Centre at the Regional Office for Africa in Harare, Zimbabwe.

From November 1990 to April 1991, while on leave without pay, she completed several short-term assignments as a secretary, grade G.4 at headquarters. On 1 May 1991 she was reassigned to the office of Governing Bodies and Protocol as a secretary at grade G.4. On 1 August 1993 the complainant was transferred with her post to the Cabinet of the Director-General. On 1 January 1995 the post was reclassified to grade G.5 and she was subsequently promoted to that grade.

On 18 September 1995 the complainant was temporarily assigned to the office of a newly-appointed Assistant Director-General who was to be her direct supervisor. By memorandum dated 30 January 1996 to the Director of Personnel, the Assistant Director-General requested that the complainant's post be formally assigned to her office.

In order to effect the formal transfer, in a memorandum dated 19 February 1996, the acting head of Classification Administration (CSA) asked that a revised post description "reflecting the change of location and duties/responsibilities and taking into account the tasks assigned", be submitted to CSA for its review and evaluation. The complainant's supervisor sent a revised post description (signed and dated 27 February 1996) and attached the official transfer request form which proposed "no change" to the grade G.5.

On 1 March the acting head of CSA replied that since the duties and responsibilities described in the post description were those normally assigned to a post of personal assistant in an Assistant Director-General's office, and classified at a higher grade than the G.5 level of the complainant, the request was considered as a classification review. Such a review would take place during the second quarter of 1996.

A "desk audit" based on the revised post description was begun by CSA, on 5 June 1996. The complainant was interviewed. During her own interview, the Assistant Director-General said that she wanted to reconsider the post description and so the desk audit was suspended. On 4 September 1996 the complainant received written notification from a personnel officer that she was being officially transferred (with her G.5 post) to the Assistant Director-General's office, effective 1 February 1996.

On 23 September 1996 the complainant was asked by her supervisor to rewrite the post description. She responded by memorandum of the same date that she believed that the post description of 27 February 1996 was "as far as possible a correct reflection of [her] duties since September 1995". Subsequently, the CSA decided to conduct a "job analysis" interview in order to determine the complainant's post classification. Both the complainant and the Assistant Director-General were interviewed. On 27 February 1997, a final post description and classification (secretary, grade G.5) was sent to the complainant.

On 7 March 1997 the complainant appealed to the headquarters Board of Appeal against this classification and she requested her promotion to grade G.7. Effective 24 April, she was reassigned to the post of G.5 secretary in the Division of Drug Management and Policies, and she subsequently appealed against this transfer as well to the Board of Appeal. The Assistant Director-General's office was staffed with an administrative assistant with a post description graded G.6. It was also subsequently staffed with a secretary with a post description graded G.5.

On 21 November the complainant's appeal was heard by the Board. In its report of 16 December 1997 to the Director-General the Board concluded that during her reassignment to the Assistant Director-General's office from September 1995 to April 1997, the complainant had performed duties above her post, similar to those of her successor, whose post description was graded at the G.6 level. It recommended that the complainant be paid an increased salary at G.6 for this period and legal costs upon presentation of the bills. Since the complainant had been reassigned to the Division of Drug Management and Policies with a valid post description graded G.5, the Board recommended the dismissal of her request for promotion to G.7.

By letter to the complainant dated 13 February 1998, the Director-General stated that he did not accept the central conclusions and recommendations of the Board's report. That is the impugned decision.

B. The complainant has three pleas. First, she submits that in this grading decision there were both errors of fact and mistaken conclusions drawn from the facts. She states that she performed the duties and responsibilities of a typical G.7 administrative assistant from 18 September 1995 to 24 April 1997, with grade G.5. She provides many written statements from WHO employees to support her contention that she did the work of a G.7, and with "dedication, competence, and courtesy".

In particular, the complainant contends that the Organization violated the principle of "equal pay for equal work",* according to WHO Manual (1978 version) paragraph II.1.40.2 which states that "posts of approximately equal difficulty and responsibility and requiring approximately the same qualifications should be placed in the same class".

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* In the 1992 revision of the WHO Manual the principle is "equal pay for work of equal value".

Second, she argues that there were formal or procedural flaws in the classification decision. She contends that she held a post for over a year without a formal classification, contrary to WHO Manual (1984 version) paragraph II.1.59 (recta 55), which states in particular, that "[o]n ... reassignment, Personnel provides the incumbent of the post with a copy of the relevant approved post description" and paragraph II.1.60 which provides that "[a] staff member may be assigned new duties not included in the post description on a full-time basis for a temporary period not exceeding 90 days. If the period exceeds 90 days, a new post description should be established and a classification review undertaken in accordance with paragraphs 80-120 to determine the grade of the post".

Given that she had not received a performance appraisal since April 1995 while employed in the Cabinet of the Director-General, the complainant contends also that the Organization had breached Staff Rule 530.2 which provides that a formal evaluation of staff shall be made "... in no case less frequently than once a year". There were also procedural errors in the "desk audit", and later the decision to undertake a "job analysis", and also with respect to the non-involvement of the Standing Committee on Post Classification Reviews.

Third, she states that there was racially-motivated personal prejudice on the part of "a responsible official", and that this was the reason for her "difficulties surrounding the *de facto* promotion".

The complainant seeks: the quashing of the Director-General's decision of 13 February 1998; a statement that her functions in the Assistant Director-General's office from 18 September 1995 to 24 April 1997 were those of a typical G.7 administrative assistant; an order that the Organization make a new decision regarding her grade for this same period; and costs.

C. In its reply, the Organization states that its grading decision is valid. It argues that its classification of the post to secretary, grade G.5 was a "proper exercise of discretionary authority and was not tainted by any flaw". According to the Tribunal's case law, the grading of posts falls within the discretionary authority of an organisation, subject to limited review.

The Organization contends that CSA and ultimately the Director-General are responsible for determining the classification of General Service posts. Thus, there was no lack of authority to classify the complainant's post in this case.

The classification process was not marked by mistake of fact or law, or mistaken conclusions drawn from the facts. The Organization contends that its systemic and thorough job analysis and classification evaluation showed that the complainant did not perform the full range of duties and responsibilities of a personal assistant at grade G.7, nor even those of a secretary at G.6. The evidence of the complainant, based solely on written statements by staff members cannot be considered conclusive. Further, the complainant's plea that she performed her duties with "dedication, competence and courtesy" is irrelevant to the grading of her post as it is inconsistent with the basic principles of post classification listed in WHO Manual paragraph II.1.30.

The Organization committed no vital formal or procedural flaw. The desk audit and job analysis were thorough and complied with the basic principles of classification. In accordance with Manual paragraph II.1.170 the involvement of the Standing Committee on Post Classification Reviews is required only when the evaluation concerns a request for the regrading of a post. In the matter of the post description, the Organization contends that there was no wilful delay on its part, therefore no procedural irregularity exists. Also, the complainant cannot invoke a flaw regarding the performance appraisal since she declined to complete the form in July 1998, and in any event, she suffered no harm.

Finally, the complainant's plea of personal prejudice is not supported by evidence.

D. In her rejoinder the complainant submits that the failure to consult the Standing Committee on Post Classification Reviews was a serious procedural flaw, contrary to WHO Manual paragraph II.1.170 which states that the Committee should be consulted during the evaluation when there is a request to regrade a post. The Organization's reply that there was no need to consult the Committee because the grade was not changed is an incorrect application of the existing rules because paragraph II.1.170 refers not to a final decision of the Committee (whether or not a grade will be changed), but to a proposed change in grade.

E. In its surrejoinder, the Organization reiterates its arguments and presses its pleas.

CONSIDERATIONS

1. The complainant, who is of Tanzanian nationality, joined the World Health Organization in 1984. After being selected for a secretarial post at grade G.4, she was promoted to grade G.5 as of 1 January 1995. In September 1995 she was temporarily transferred to the office of a new Assistant Director-General, Mrs A. Koné-Diabi, who requested on 30 January 1996 that the complainant's post be formally assigned to her office. The decision to transfer the post was made on 4 September 1996. However, the transfer neither changed the complainant's grade, nor included a modified post description, despite a post description form and a request for a classification review signed by her supervisor on 27 February 1996. There remained doubt as to the nature of the work that the Assistant Director-General expected from the complainant and the reality of the tasks assigned to her, which she had effectively been carrying out until a "job analysis" was undertaken. Following this analysis, and in spite of objections from the complainant, the post description maintaining the classification as secretary, at grade G.5, was communicated to her by a memorandum of 27 February 1997. From 24 April 1997, the complainant was assigned to a G.5 secretarial post in the Division of Drug Management and Policies.

2. The complainant lodged an appeal with the headquarters Board of Appeal against the post description of 27 February 1997. After in-depth examination and after hearing many witnesses, and while it did not wish to usurp the place of the authorities responsible for classifying posts, the Board found that the post description proposed by the Assistant Director-General on 27 February 1996 was equivalent to that of a grade G.7 administrative assistant assigned to an assistant director-general. It concluded that,

ırding to witness testimony which was unchallenged by the
ninistration, the complainant had carried out the same tasks in the office
he Assistant Director-General as those performed by her successor,
ıse post description was classified at grade G.6. It added that the
ıplainant had fulfilled her tasks satisfactorily and that she had grounds
complaint that her evaluations had not been completed on time, and that
had not received a post description within the time limits set out by a
reading of WHO Manual paragraphs II.1.70 and II.1.210. The Board
d a negative change of attitude on the part of her supervisor towards the
ıplainant in 1996, but that it was now impossible to reclassify the post
ıuse she had been transferred in the meantime. It recommended, in
ırdance with Article 320.4 of the Staff Rules, which provides that a staff
ıber required to assume the responsibilities of a post of a higher grade
that which he occupies should receive differential compensation, that
complainant should be paid an increased salary at G.6 level for the
od from September 1995 until April 1997 and receive costs.

In a decision of 13 February 1998, the Director-General of the WHO
sed to review the grading of the complainant and to pay her a higher
ry than that of her G.5 grade, while recognising the delay in drawing up
post description, and consequently agreeing to pay her legal costs of
United States dollars. That is the decision contested before the Tribunal.

3. As firm precedent has it, for example Judgment 1647 (*in re* Bombo
jimbi), which deals precisely with post classification in the WHO,
sions in respect of post classification are at the Administration's
etion and can only be set aside on limited grounds. It does not behove
Tribunal to substitute its own post assessment for that of the
ınization's, unless the evaluation was taken without authority, or in
ch of a rule of form or of procedure, or was based on an error of fact
f law, or overlooked some essential fact, or was tainted with abuse of
ority, or if a clearly mistaken conclusion was drawn from the facts.

4. The facts show a degree of uncertainty regarding the real duties
lled by the complainant, and it is regrettable and wrong that the post
ription, which was different from the one initially proposed by her
rvisor, was drafted late.

5. To convince the Tribunal that the contested decision was unlawful, the complainant asserts that when assigned to the Assistant Director-General, she performed the duties and responsibilities of a typical G.7 administrative assistant. It was therefore incorrect that her post description of 27 February 1997 maintained her G.5 classification. The complainant adds that the challenged decision was in breach of a rule of procedure, particularly since there had been no involvement of the Standing Committee on Post Classification Reviews prior to the decision. Finally, she states that there was racially-motivated personal prejudice against her, and that in any case, the Organization had violated the principle of "equal pay for equal work".

6. The pleas based on procedural flaws and abuse of authority cannot be allowed. In the first place, the Administration was not obliged to convene the relevant Standing Committee, because paragraph II.1.170 of the Manual provides for intervention by this Committee where a procedure of review of classification is engaged. This was not the case here: neither the complainant's supervisor nor the bodies responsible for staff management initiated such a procedure. In the second place, there is not the slightest evidence to uphold the accusation of abuse of authority in the argument that the contested classification might spring from the personal animosity of her supervisor towards the complainant.

7. The very careful procedure followed to evaluate the duties fulfilled by the complainant in the Assistant Director-General's office was not irregular and, in view of the Tribunal's limited powers in this respect, the Administration's discretion cannot be called into question. That the complainant carried out her duties competently, which is uncontested, is not a ground for reviewing the classification of her post, and the Tribunal recalls in this connection, as it did in Judgment 1647 cited above, that: "grading hinges neither on quality of performance nor on seniority. The sole criteria are the duties and responsibilities of the post. And the grade cannot change unless there is a 'significant change in [their] level'".

8. However, while the post description dated 27 February 1997 is not irregular in itself, and shows a clear understanding of the level of duties fulfilled by the complainant at the time of the decision, the Tribunal notes,

as did the Board of Appeal, that the complainant ought to have received her post description as soon as she took up the post, that is on 18 September 1995, but she received it about eighteen months later. The post description proposed by her supervisor in February 1996 included more complicated tasks than those required of a secretary at grade G.5, and it was natural that the complainant referred to this description, even if it carried no legal weight. Moreover, many testimonies considered by the Board bear witness that the complainant, while working with the Assistant Director-General, carried out certain duties which, although not corresponding to those of an administrative assistant at grade G.7, exceeded those normally assumed at grade G.5. The solution recommended by the Board of Appeal and noted in 2 above, takes account of the Organization's delay in clarifying the situation, and in view of all the elements in the file the Tribunal is in agreement with that solution. Without quashing the challenged decision, the complainant is entitled to compensation equal to the difference between the salary she received, and the salary she would have received if she had held a G.6 grade for the period from September 1995 to April 1997.

9. The complainant shall receive costs set at 5,000 Swiss francs.

DECISION

For the above reasons,

1. The WHO shall pay the complainant compensation as established under consideration 8 of this Judgment.
2. The WHO shall pay the complainant 5,000 Swiss francs in costs.
3. Her other claims are rejected.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

EIGHTY-SEVENTH SESSION

***In re* Natarajan (No. 2)** **Judgment 1875**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Krishnan Natarajan against the International Labour Organization (ILO) on 10 September 1998, the ILO's reply of 22 December 1998, the complainant's rejoinder of 29 January 1999 and the Organization's surrejoinder of 25 March 1999;

Considering Articles II, paragraphs 1 and 6, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian national who was born in 1940, entered the service of the Organization in March 1963. At the time of the material facts of the present case, he was Deputy Director of the ILO Office in Manila in the Philippines, at grade P.4. Following the transfer of his immediate superior in December 1994, he was put in charge of the Office until April 1995, when the new Director took up his duties.

In a fax letter dated 30 August 1996 addressed to the Deputy Director of the ILO's Regional Office for Asia and the Pacific, in Bangkok, the Director of the Manila Office complained of the attitude of the complainant and reproached him for his insubordination, animosity towards him, negligence in his work and accused him of wishing to "oust" him from his post and of tarnishing the image of the Organization. The Director attached to his letter various documents, including a "note for the file" dated 3 October 1995, in which he stated that on that day he had discussed with the complainant his work and conduct. He accused him of encouraging a locally recruited staff member to disobey instructions, of having attempted at the last minute to cancel a training session on gender issues and equality, of using Office cars to come to work, of allowing his friends to benefit from special privileges reserved for the Office (and particularly of having certified that a staff member was travelling on official business to avoid paying certain taxes and of offering the use of the Office car to a staff member from headquarters for a tourist visit) and finally of being aggressive towards his colleagues. He indicated that as a consequence he had decided to entrust the complainant's administrative and financial responsibilities to another staff member.

On 5 September 1996, the Resident Co-ordinator of the United Nations in the Philippines wrote to the Director of the Regional Office, with copies to the Deputy Regional Director and the Director of the Personnel Department at headquarters. He recalled that he was about to leave his post and wished to congratulate the Director of the Manila Office on his work. He also indicated that he had had occasion to discuss the behaviour of the complainant with the Director of the Manila Office and wished to corroborate his allegations. He criticised the complainant for not having the necessary "intellectual profile" and recommended that prompt action should be taken.

Summoned to the Regional Office at the beginning of October, the complainant was given the two documents mentioned above and met the Director of the Office and her Deputy. The Organization states that "no further action was taken on this matter".

In letters dated 4 and 22 October 1996, the complainant requested the Director of the Regional Office that the matter be reviewed in accordance with Article 13.1 of the Staff Regulations. In two other letters, dated 21 October and 4 November, he responded in detail to the accusations levelled against him. He affirmed that the Resident Co-ordinator had written his letter at the request of the Director of the Manila Office and accused the latter of wishing to harm his reputation and of having violated the conduct expected of an international civil servant and Article 1.1 of the Staff

Regulations by discussing an internal ILO problem with a person outside the Organization. He regretted that no action had been taken in response to a request for a transfer on health grounds which he had made in February 1996. He expressed surprise at not having received a copy of the note for the file in October 1995 and submitted that its contents and the coincidence of its transmission with the letter from the Resident Co-ordinator gave grounds for believing that it was not prepared on that date, but in August or September 1996, with the sole objective of maligning him.

With regard to the contents of the note for the file, the complainant denied all the accusations made against him. He stated that he had been opposed, not to the training session, but to the use of the financing allocated for that session for other purposes; that the travel exemption certificate had been signed by the Director of the Office himself while the complainant was on mission in Thailand; and that the headquarters official who was on mission had not had the time to make the alleged visit. Finally, he accused the Director of the Office of having made racist remarks about him, particularly in the presence of constituents of the Organization at a conference on 22 September 1995. He indicated that the Director had apologised to him on 4 October 1995 in the presence of a representative of the Staff Union and that he had believed the incident closed until the production of the note for the file. He also accused the Director of having sent him work while he was convalescing from a stroke in January 1996.

By a letter of 1 November 1996, after consulting the Director of the Personnel Department, the Director of the Regional Office rejected his request for review.

On 24 February 1997, the complainant lodged a complaint under Article 13.2 of the Staff Regulations reiterating his accusations against his immediate superior. He requested early action on the complaint.

The observations of the Director of the Manila Office were transmitted to the complainant on 28 April 1997. He admitted having many discussions with the Resident Co-ordinator concerning the functioning of the Manila Office in general and the attitude of the complainant in particular, but denied having incited him to write the letter of 5 September 1996. He also admitted having signed the travel exemption certificate, but maintained that the complainant had instigated the procedure. He specified that the use of an official car for a tourist visit by an official on mission had not taken place because he had prevented it. He denied being a racist and stated that remarks concerning nationality were made as jokes by all staff members, including by the complainant concerning him. The complainant had only become offended after the quality of his performance had been criticised. Finally, he submitted that the complainant himself had requested that work be sent to his home during his convalescence.

The complainant replied to these observations by letter of 14 May 1997. He reiterated his reproaches and accusations, stated that he never joked about nationality and denied that he had asked for work to be sent to him, as his doctors had prescribed complete rest.

The complainant left the service of the Organization on 31 May by mutual agreement. This agreement indicated that the termination payments which would be paid to him were agreed as full settlement of all entitlements or claims under the Staff Regulations.

After receiving a fax letter sent by the complainant on 5 September 1997, the Personnel Department replied by letter of 13 October, which he only received on 29 December, that his complaint would be examined "as rapidly as possible". Not having received a reply, the complainant lodged a first complaint with the Tribunal on 27 March 1998 against the implicit decision to reject his internal complaint. He withdrew this complaint when he received the decision of the Director-General, of which he was informed by a letter from the Director of Personnel dated 19 June 1998.

The Director-General noted that relations between the Director of the Manila Office and his Deputy had not been good from the beginning, but observed that the explanations put forward by the Director in support of his allegations of insubordination by the complainant had not been considered sound justification and that no measures had been taken. The Director-General considered that the discussions held by the Director with the Resident Co-ordinator were normal between colleagues within the United Nations system. Furthermore, it was difficult for him to believe that the Director would have sent work to the complainant during his convalescence without his agreement. With regard to the note for the file, he stated that the reasons provided were not sufficient to serve as a basis for the serious accusations that it contained and that certain statements, such as those relating to the use of the official car and the privileges reserved for the Office, were baseless and unjustified. The Director-General informed the complainant that he had decided to draw the attention of the complainant's immediate superior to the need for accuracy in recording events and to the procedures to be followed in managing staff. With respect to the accusations of racism, the Director-General affirmed that this constituted the most serious incident. Therefore, despite the apologies which had been made, he had instructed the Personnel Department to remind the Director of the Manila Office of the conduct expected of international civil servants. The Director-General concluded that, in these circumstances, the complaint filed by the complainant did not call for any further action. This letter is the impugned decision.

B. The complainant reiterates the pleas made in his internal complaint. He expresses surprise that the Director-General, having recognised the allegations of racism, did not take more severe measures than merely reminding the official concerned of the conduct expected of him. He submits that the Organization had the responsibility to defend him against unfounded criticisms from outsiders and, as such, should have responded to the Resident Co-ordinator of the United Nations. He considers that his departure by mutual agreement, which was signed after his complaint had been filed, did not dispense the ILO from following up the complaint and that the reference in the agreement to the settlement of all his entitlements or claims under the Staff Regulations only related to his entitlements under the articles of the Staff Regulations cited in the agreement. The complainant contends that the attitude of his immediate superior caused "irreparable" moral and material damage, harmed his health and caused him to leave the service of the Organization.

He asks the Tribunal to recognise that the Director of the Manila Office did not treat him correctly, made racist remarks against him and violated the Staff Regulations and that the Director-General failed to consider his complaint properly, thereby exacerbating the harm caused to him. He claims 100,000 United States dollars in damages, 15,000 dollars in compensation for medical costs and 9,000 dollars in costs.

C. In its reply, the Organization contests the receivability of the complainant's claims relating to the injury suffered and the financial compensation on the grounds that the complainant has not exhausted the internal remedies. The Organization states that the complainant made no such claim, even by implication, in his internal complaint. It adds that the mutual termination agreement should be understood as the settlement of all outstanding and future claims under all the provisions of the Staff Regulations. Finally, it states that the Organization cannot be held responsible for acts committed by the Director of the Manila Office which were officially condemned by the Director-General in his reply to the complainant's internal complaint.

On the merits, the Organization reiterates the conclusions of the Director-General and considers that the necessary measures have been taken. It states that the complainant, who had not made specific claims in his internal complaint, could not expect more. It submits that the complainant had already had difficult relations with the previous Director of the Manila Office and observes that it gave him the opportunity to defend himself against the criticisms made against him. Finally, it produces a memorandum from the Director of the Manila Office dated 20 July 1998 in which he contests that the remark on the nationality of the complainant was made at a conference attended by ILO constituents. According to him, the remark was made in the Office in the presence of two colleagues and a visitor. The Organization recalls that the complainant was informed that an "official rebuke" had been made to the Director of the Manila Office and emphasises the seriousness of such action.

D. In his rejoinder, the complainant submits that he has exhausted the internal remedies since the Organization rejected his request for review and since he had referred on several occasions, and particularly in his internal complaint, to moral and material damages. He contends that the ILO's interpretation of the mutual termination agreement is in violation of Article II, paragraph 6, of the Statute of the Tribunal, which states that officials shall have access to the Tribunal even if their employment has ceased. Finally, he observes that he is not aware of the terms in which the Director-General rebuked the Director of the Manila Office for his action, or the sanctions taken against him.

On the merits, the complainant contends that he enjoyed good relations with his previous immediate superior. He accuses the Organization of partiality and submits that its reply is in contradiction with the compliments addressed to him in writing by the Director-General on 21 May 1997 on the occasion of his departure. He adds that his immediate superior did not stop his racist insults, even after he had apologised.

E. In its surrejoinder, the ILO affirms that the complainant has not been deprived of access to the Tribunal, but that the mutual termination agreement prevents him from submitting claims with financial implications. It recalls that the Director-General had concluded that several allegations were unfounded, that the Director of the Manila Office had made offensive remarks and that he should carry out his functions with greater prudence and rigour, but that the complainant also had some degree of responsibility for the atmosphere at work in the Office. With regard to the disciplinary measures envisaged by the Staff Regulations, it states that these are at the discretion of the Director-General.

The Organization produces a memorandum of 25 March 1999 to the Legal Adviser from the previous Director of the Manila Office, indicating the minor but repeated problems that he had experienced with the complainant. However, the ILO specifies that it "is not seeking to affirm that [these] allegations, often unsubstantiated ... were necessarily well-founded" and that it does not deny the contribution made by the complainant to the work of the Organization. Finally, it observes that the complainant's statement that the racial abuse never stopped is not consistent with his previous statements.

CONSIDERATIONS

1. The complainant, an Indian national, joined the General Service category of staff of the ILO in March 1963 and worked at its Office in New Delhi. In 1969 he was given an indefinite appointment. In 1985, after an internal competition, he was promoted to the Professional category (P.3), and was posted as Programming Officer to the ILO's Caribbean Office. In 1988 he was transferred to the Occupational Health and Safety Department (SEC/HYG) at headquarters in Geneva. After another internal competition

he was promoted to P.4 and was transferred to the Manila Office as Deputy Director in April 1994. His appointment came to an end on 31 May 1997 by mutual agreement.

2. In 1994 the Director of the Manila Office was Mr Paul Bailey. He was transferred to Dhaka with effect from January 1995, and was succeeded in April 1995 by Mr Richard Szal. In the meantime, from January to April, the complainant was in charge of the Manila Office. In this complaint, he alleges that Mr Szal, the Director at the material time, subjected him to unjustifiable and unfair treatment during the period from 1995 to September 1996.

3. When transferred to Manila, the complainant had served the ILO for over thirty years with, he says, "distinction and exemplary conduct" as his performance appraisals would show. Even upon the termination of his employment in 1997, despite the events which gave rise to this complaint, the Director-General expressed unqualified appreciation of his loyalty and devotion to the ILO and his valuable contribution to its work. In its pleadings, the Organization does not dispute that record of service.

4. There was one matter, which undoubtedly would have seriously affected the working relations between the Director and the complainant, as to the truth of which there is little dispute. The complainant says that from July 1995 the Director began using particular expressions with racial connotation "used in the Philippines by the local population to refer to Indians in a derogatory manner". When the Director used that expression at a conference held on 22 September 1995, in the presence of the ILO's tripartite constituents, he was forced to complain to the Staff Union representative, in whose presence the Director later apologised on 4 October 1995.

5. On 14 April 1997, responding to a request from the Personnel Department following Mr Natarajan's 13.2 "complaint", the Director did not deny the use of that expression (either before or at a conference in September 1995) or its derogatory connotation, and pointed out that he had apologised. His only defence then was that it was the common practice, at the Manila Office, to joke about each other's nationality; that the

complainant made fun of the Director's nationality; and that in the same spirit he too joked with the complainant. However, the Director submitted another explanation in a minute dated 20 July 1998 (which the ILO annexed to its reply). There he claims that he used a different expression ("my Bombay Deputy"); that on 22 September 1995 it was not used at a conference, but only in the corridor of the Office; and that he only did so when the complainant introduced him to a friend as "our Gringo Director". Not only does the belatedness of that explanation weigh heavily against its acceptance, but its inconsistency with his previous position reveals a grievous lack of care by the Director in stating the facts relevant to a serious allegation.

6. The complainant claims that the Director's behaviour affected his health. He was admitted to hospital in November 1995 for hypertension and a heart problem. Although he resumed duties after treatment, he was again hospitalised in January 1996 after a "blackout", and returned to work only at the end of March.

7. In June 1996 there commenced the evaluation of the complainant's performance for the two-year period 1 October 1993 to 30 September 1995, which consisted of four periods: October 1993 to April 1994 when he was at SEC/HYG; April to December 1994 when his Director was Mr Bailey; January to April 1995 when he was in charge of the Manila Office; and April to September 1995 when Mr Szal was his Director.

8. Mr Szal rated the complainant's performance as "satisfactory". His comments and observations were favourable, except one: that the complainant "needs to exercise more caution and judiciousness in the allocation of Office resources, particularly when he is Officer-in-Charge [and] should also maintain a calm demeanour in dealing with his colleagues". On 11 June 1996, the complainant noted his objections to that comment. He also complained that Mr Szal – though responsible for only six months of a two-year period – had refused to request the evaluation of SEC/HYG and Mr Bailey; and he pointed out errors and shortcomings in the way Mr Szal had completed the evaluation. He asked for a review by the Reports Board. It was only then that the observations of SEC/HYG and Mr Bailey were obtained by the Regional Office for Asia and the Pacific:

those were, without exception, favourable. The Assistant Director-General in charge of the Regional Office, as the higher level chief, noted on 15 November 1996 that the complainant's performance had been under continuing review during the past few months; that the complainant had come to Bangkok for discussions; and that both Mr Szal and he had made "extensive further comments in writing". In response, the complainant observed that only events from October 1995 - which were beyond the period of review - had been discussed in Bangkok, and not his performance appraisal. If Mr Szal did make comments to the Regional Office about that performance appraisal, those were not disclosed to the complainant or the Tribunal.

9. The Reports Board had to determine whether the impugned comment was justified. It merely expressed concern about the developments which led to an untenable situation in the Manila Office and urged the Regional Director to find a solution. Nothing was said about the appraisal itself. The observations of the Reports Board were communicated to the complainant only on 13 May 1997, by which time termination had been mutually agreed upon.

10. Apart from that comment in his performance appraisal, prior to September 1996, neither Mr Bailey nor Mr Szal (or any of the complainant's superiors, colleagues or subordinates) had expressed any dissatisfaction in writing about any aspect of the complainant's work and conduct.

11. In early September two letters reached the Regional Office almost simultaneously.

12. The first was a letter dated 30 August 1996 from the Director of the Manila Office, faxed on 9 September to the Deputy Director of the Regional Office. He referred to previous telephone conversations regarding his problems with the complainant which, he said, had begun about a year before, and went on to make several very serious general allegations against the complainant: that he had stopped communicating with him and most other staff, that his conduct was divisive and insubordinate, that his negative activities and smear campaign against him even extended outside the Office,

and that he was damaging the effectiveness of the ILO's work programmes inside and outside the Office. He annexed a "note for the file" dated 3 October 1995 (which he had prepared) containing further general allegations: that the complainant had exceeded his authority, that he had misused Office resources and property to suit himself and his friends, and that he had harassed certain staff members. That note contained five specific allegations, but made no reference to the discussion and the apology relating to the racial remarks made by the Director.

13. The second was a letter dated 5 September 1996 from Mr McGrath, the United Nations Resident Co-ordinator in Manila, to the Assistant Director-General in charge of the Regional Office, praising the Director's performance highly, and severely criticising the complainant's:

> "I have over the last year had several lengthy discussions with Mr Szal regarding the behaviour of his deputy ... The Regional Office in Bangkok is aware of a number of actions taken by the latter which have not contributed to a harmonious atmosphere within the office. ... I have been able to corroborate Mr Szal's concerns which are shared by several of the local staff. ... [the complainant] lacks the intellectual profile which ... [the] ILO Manila requires ..."

14. The Assistant Director-General summoned the complainant to Bangkok for discussions, and it was only then – on 2 October 1996 – that those two letters and the note for the file were disclosed to him.

15. The complainant submitted detailed observations in respect of both letters, in particular, during any discussion of the issues mentioned in the note for the file. The Regional Office did not tell him either that his explanation had been accepted or that no action would be taken in respect of the allegations made against him.

16. A request for review having been refused, the complainant filed a formal "complaint" on 24 February 1997. He alleged that the Resident Co-ordinator's letter had been instigated by the Director to injure his moral and professional character unfairly; that the latter's letter of 30 August had been faxed on 9 September so as to arrive at the same time as the Co-ordinator's: that it was a wrongful attack on his professional conduct and

character; and that his supervisor had thus subjected him to unjustifiable and unfair treatment under Article 13.2 of the Staff Regulations.

17. Responding to these allegations, the Director stated by letter of 14 April 1997 that from the time he assumed duties in Manila he had several discussions with the Resident Co-ordinator about numerous problems concerning the complainant's competence and conduct: that he understood that the Co-ordinator had "sought independent confirmation of [the Director's] complaints from other colleagues in the Area Office" before writing to the Assistant Director-General and that he had not instigated that letter. To that the complainant gave a detailed and reasoned response on 14 May 1997.

18. In the meantime, on 21 April 1997 it was mutually agreed that the complainant's appointment would come to an end, in accordance with Article 11.16 of the Staff Regulations, on 31 May 1997, and that he would then be entitled to various terminal benefits under the Staff Regulations (a repatriation grant, repatriation travel and removal expenses, reimbursement of accrued annual leave and an indemnity, under Articles 11.15, 9.7, 7.5(b), and 11.16 respectively). Those payments were agreed "as full settlement of all entitlements or claims that [he] may have under the Staff Regulations".

19. Six months having elapsed without a decision upon his "complaint", in September the complainant informed the ILO that he proposed to file a complaint with the Tribunal - which he did on 27 March 1998. The Director-General's final decision dated 19 June 1998 was thereafter communicated to him, whereupon he withdrew his first complaint. On 10 September he filed the present complaint, impugning that decision.

20. It is necessary for the Tribunal to scrutinise the five specific allegations made by the Director of the Manila Office.

(a) First he alleged that the complainant improperly "certified that a staff member was travelling on official ILO business ... to help her avoid paying the departure tax ...". When the complainant pointed out that it was the Director who had signed that staff member's travel exemption certificate on 18 September 1995, while he himself was away in Bangkok, the Director prevaricated, saying that if his note for the file was read carefully, it would show that he had never accused the complainant of signing the travel exemption certificate, but only of instigating it - which he reiterated. The complainant justifiably dismissed that as a pathetic response, because the Director had clearly stated earlier that the complainant had signed it.

(b) His second allegation was that the complainant "offered the use of the Office car to Mr X during his mission to the Philippines for a personal sightseeing trip ... when [the Director] was away from the Office". The complainant replied that Mr X had arrived in the Philippines on 22 July 1995, went to Cebu the next day, returned to Manila only on 27 July at 12.15 p.m., and left for Geneva the very same day at 7.55 p.m. The Director then claimed, in reply, that "Mr X returned from Cebu on Friday 27 July, and even came to [the Director's] Office to brief [him]"; that Mr X was due to depart "in the evening of Saturday 28 July"; that he left the Office "at around 5.30 p.m. on Friday" but later returned and found that steps were being taken to arrange a sightseeing trip for Saturday prior to departure. The complainant countered that the Director's version was wholly unacceptable because 27 July was a Thursday; that Mr X had in fact left Manila on that day, and not on the Saturday as the Director claimed; and that he could not have met him in the Office on the Friday.

(c) The third allegation was that the complainant was using an Office car to bring him to work every day; however, he did not tell him to stop that practice. The complainant maintained that he used the Office car only when he was entitled to do so. The Director then changed his position, alleging that when he joined the Manila Office he found that it was "standard operating procedure" for the complainant to use an Office car to pick him up and take him home every day; and that it was only after he questioned the complainant that the latter stopped that practice. He thus conceded that any improper use of the car had stopped long before 3 October 1995.

(d) The Director's fourth allegation was that the complainant had "encouraged" a staff member to request a briefing trip to Bangkok, despite refusal by both him and the Regional Office, and that he went so far as to have him telephone the Director, while on home leave, in Chicago. The complainant said that such a briefing trip had never been discussed. He said that in September 1995 he had turned down the staff member's request to be included in a training programme in Bangkok, in accordance with a decision taken by the Director. The latter again changed his position, saying that he had made it clear to the complainant that it was not possible for the staff member to participate in that programme, and that he had expected the complainant to deal with the situation; adding that it was "very strange" that the staff member had telephoned him in Chicago.

(e) the last allegation was that the complainant had attempted on the eve of the "Gender Training" programme to cancel that programme. The complainant explained that a "Team Building" exercise had been arranged for the Manila Office from 27 to 30 September 1995; as the budgeted funds were inadequate, it was combined with a "Gender Training" programme; and when it was suddenly proposed to use funds from the Gender Training Budget to meet the shortfall, he informed the Regional Office. When the Director persisted with this charge, the complainant pointed out, further, that the Manila Office was substantially subsidised using funds meant for the entire Asian region.

21. The Director-General's reasoning and conclusions in his letter of 19 June 1998 may be summed up as follows.

(a) He made two general observations. He noted that "the allegations on which [the Director's] action was based were not considered to be a sound justification for disciplinary procedure", and that "while [in the note the Director] makes serious general statements, none of the reasons he provides for these statements lends weight to their seriousness". Further, before considering the merits he stated that "According to the Regional Office, from the very beginning … relations between the two … were not good. This situation, … was of public knowledge; both … had made representations to the then Deputy Director of the Regional Office". At no stage was it disclosed, either to the Tribunal or to the complainant, what information the Regional Office had given the Director-General and what representations the Director had made to that Office (besides his comments on the performance appraisal).

(b) He concluded that "By far the most serious incident was the remarks made [by the Director during the conference] in front of constituents of the Organization. … The Director General has instructed the

Personnel Department to bring the matter to the attention of [the Director] and to remind him of the conduct expected of international civil servants".

(c) As for the three allegations discussed at 20(a), (b) and (c) above, he held that the Director's statements "in his note for the file were indeed baseless", "no action was, or could have been taken, based on them"; and that he had, however, "decided to draw [the Director's] attention to the need for accuracy in recording events and to the procedures to be followed in managing staff". He also said - incorrectly - that the Regional Office, after hearing the complainant, had decided that no action was warranted: in fact, it had never communicated such a decision to the complainant.

(d) The Director-General concluded that the allegations at 20(d) and (e) above were "not entirely devoid of merit". While he noted that the Director had "rectified" his allegation by no longer alleging that the complainant had encouraged the staff member mentioned above to go to Bangkok, nevertheless he held that the circumstances, given his relationship with the complainant, may have caused his perception that there had been such encouragement. In coming to that conclusion, the Director-General relied on information from the Regional Office - not previously disclosed to the complainant - that the complainant had continued to press for the staff member's inclusion even after the programme had begun. As for the alleged attempt to cancel the "Gender Training" programme, the Director-General unequivocally held that since the complainant was the official in charge of the follow-up of financial questions, he was "justified in raising objections to such a use of funds which had a very specific allocation"; nevertheless he expressed the view that the complainant, instead of informing the Regional Office, should have discussed the issue with the Director and found ways of settling the matter with him.

(e) Finally, the Director-General observed that the Regional Office explained that the Resident Co-ordinator's letter was a confirmation of previous representations made by him; that his views were expressed on the basis of initiatives taken by him and experience of working with the complainant; and that the admitted discussions with the Director were about the "difficulties" he was encountering in his "relationship" with the complainant. Such discussions were normal among colleagues within the United Nations system; the Director did not go beyond seeking advice, and did not ask the Co-ordinator to make representations to the Regional Office. He concluded that the Director did not "instigate" that letter, and there was no unfair treatment in that respect.

22. The Director-General did not give the complainant a copy of the communication which he sent to the Director; and the ILO does not say that any communication whatever was sent to Mr McGrath in response to his letter of 5 September 1996.

23. The complainant claims that:

(a) the Director treated him inconsistently with the provisions of the Staff Regulations and his contract, and subjected him to unjustifiable and unfair treatment;

(b) the Director violated Articles 1.1 and 1.4 of the Staff Regulations in discussing his conduct and behaviour with an outsider, namely the Resident Co-ordinator, and in inciting him to write a letter to the Regional Director in order to malign his professional and moral conduct;

(c) the Director repeatedly racially abused him;

(d) the Director-General, in violation of Article 13.2 of the Staff Regulations, failed to consider properly and thereby acted erroneously with respect to the issues raised in his complaint to the Director-General;

(e) the Director-General in failing promptly to consider his complaint exacerbated the harm caused to him, including damage to his health;

(f) in consequence he suffered professional, moral and material damage, including health problems, and the expense of medical treatment;

(g) that there has been non-observance of the terms of his appointment and the Staff Regulations, for which he claims 124,000 United States dollars - consisting of 100,000 dollars for professional, moral and material damage, 15,000 dollars on account of medical expenses, and 9,000 dollars in costs.

Receivability

24. The ILO argues that claims (e), (f) and (g) are irreceivable because these claims were not made in the internal complaint; that the complainant is estopped from asserting them because by accepting the terms of the letter of 21 April 1997, he accepted the termination payments as full settlement of all his claims under the Staff Regulations, including the claims (e), (f) and (g); and that claims (a), (b) and (c) are irreceivable because they ask the Tribunal to make findings that were not requested in the internal complaint "and show no cause of action insofar as they seek to hold the Organization responsible for acts committed by the Director which were officially condemned in the Director-General's reply".

25. In his internal complaint the complainant stated that certain previous letters should also be treated as part of his complaint. Claim (a) was expressly made in that complaint. Not only are claims (b) and (c) specific instances of the unfair treatment alleged in claim (a), but they are also expressly mentioned in the complainant's letters of 4 October, 21 October and 4 November 1996. Further, the complainant's grievance is that the Director-General failed to condemn some of the Director's impugned acts, and failed to take proper action in respect of those which he did condemn. As for the plea of estoppel, the Tribunal recalls that even after 21 April 1997 the ILO asked the complainant for his comments on the Director's observations; and when the complainant inquired about the delay in the Director-General's decision, the ILO said that a decision would soon be sent. Throughout, the ILO acted on the basis that the agreed termination did not affect the complainant's rights relating to his internal complaint. The Tribunal holds that claims (a) and (c) are receivable.

26. Claim (d) is not objected to. The Tribunal holds that the claims (e), (f) and (g), insofar as they relate to professional, moral and material damage consequential to claims (a) to (d), are receivable, but not insofar as they relate to health problems and medical treatment, as that aspect was not included in the internal complaint.

Merits

27. The ILO made no attempt to justify the serious general allegations made by the Director. The Director-General concluded that, out of five specific allegations, the three most serious – involving misconduct of one kind or another – were "baseless". Further, the Director was found to have made racial remarks. Nevertheless, the Director-General did not come to a finding that he had subjected the complainant to unjustifiable or unfair treatment inconsistent with his contract or the Staff Regulations, nor did he direct that any disciplinary measure be taken against the Director. Although the ILO's reply emphasises the "extraordinary seriousness of the action taken, namely an official rebuke to a superior in front of his subordinate", in fact the Director-General neither ordered a rebuke nor even gave the complainant the satisfaction of receiving a copy of the communication sent to the Director.

28. Further, the Director-General ignored material facts in concluding that the other two allegations were not entirely devoid of merit, relying on the new positions taken up by the Director, although it was plain that the original allegations – that the complainant gave encouragement to a staff member in respect of a briefing trip and that he had attempted to cancel the Gender Training programme – were both false in material respects.

29. Thus the five allegations that the Director made by means of his letter of 30 August 1996 were all false. If the note for the file was prepared on 3 October 1995 – as the Director claims – when the events were relatively fresh in his memory, it is most improbable that he would have made mistakes in regard to all five. The conclusion is that he either, deliberately or recklessly, made false allegations or the note was prepared much later, when his recollection had faded. The fact that the Director's comments in the complainant's performance appraisal do not even hint at any of those five allegations lends support to the complainant's contention that the note was prepared much later.

30. The Director-General's conclusions as to the Resident Co-ordinator's letter are seriously flawed in several respects. There was no evidence that he had made previous representations, and if there had been

any, they were not disclosed to the complainant. The Director-General failed to take into consideration the fact that if the Director had any "difficulties" in his relationship with the complainant, they were entirely due to his own conduct. Although the Director-General referred to "discussions" which the Director had, with a view only to getting "advice" from the Co-ordinator, the Director's statement made it clear that he had made "complaints" about which the Co-ordinator went on to seek "independent confirmation" from the complainant's colleagues. The Director-General ignored the fact that the Director did not disclose those "complaints" either to his superiors or to the complainant. In those circumstances, it is clear that but for the Director's complaints to him, the Co-ordinator would not have written to the Regional Office; and even if the Director did not directly ask him to write that letter, he must have known that the Co-ordinator would probably communicate his complaints to the Office. It was therefore wholly unreasonable to conclude that what took place between the Director and the Co-ordinator was normal among colleagues in the United Nations system.

31. With its surrejoinder of 25 March 1999 the ILO has produced a memorandum of the same date addressed by the former Director in Manila to the Legal Adviser, in which the former makes new allegations about the complainant's conduct during 1994. These had never been brought to the complainant's notice. The complainant submitted a further statement in relation to this memorandum. Since neither is relevant to the issues to be decided the Tribunal will ignore them.

32. An international organisation is liable for the material and moral damages resulting from the injury caused to a staff member by his superior (acting in the course of his duties and not in a private capacity) by treatment that is an affront to the staff member's personal and professional dignity (Judgment 1609, *in re* Souza and others, under 16); and for victimisation consequent upon improper treatment (Judgment 1376, *in re* Mussnig, under 16 and 19). A staff member is entitled to have his good name vindicated by the organisation when a superior makes false allegations against him and to redress for the harm caused (Judgment 1340, *in re* Vollering No. 3, under 13 and 14; see also Judgment 1344 *in re* Angius No. 2, under 19). When a third party makes false allegations against a staff member, the organisation should communicate its view that the allegations are without foundation (Judgment 1376, under 16).

33. The Tribunal holds that the Director used racial expressions about the complainant, made false allegations against him to his superiors without any excuse and discussed his conduct with an outsider - the Resident Co-ordinator - intending, or knowing it to be likely, that he would convey his allegations to the Regional Office. The action taken by the ILO in respect of the Director did not adequately protect the complainant's good name or repair the affront to his personal and professional dignity. Further, the ILO failed to take any action to inform the Co-ordinator that his allegations were unfounded, and thereby failed to protect the complainant's reputation. Consequently, the ILO is liable to compensate the complainant for the moral injury suffered by him.

DECISION

For the above reasons,

1. The ILO shall pay the complainant 20,000 United States dollars in damages.
2. The ILO shall pay him 2,000 dollars in costs.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Mark Fernando, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

MARK FERNANDO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

***In re* Rai**

Judgment 1876

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Ram Lakhpat Rai against the World Health Organization (WHO) on 25 May 1998 and corrected on 1 July, the WHO's reply of 2 November, the complainant's rejoinder of 30 December 1998 and the Organization's surrejoinder of 7 April 1999;

Considering the applications to intervene filed by Mr Jogindar Singh Battra and Mr Devendra Nath Sethi;

Considering Articles II, paragraph 5 and 6, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian citizen who was born in 1932, joined the staff of the WHO's Regional Office for South-East Asia (SEARO), in New Delhi in 1959 at grade ND.4. He retired on 1 April 1992 at grade ND.8 and remained a participant in the WHO Staff Health Insurance scheme.

Rule 520 of the Staff Health Insurance Rules requires that:

> "In each region the regional director establishes a surveillance committee of similar composition to that at headquarters, and representative of administration, staff and retired staff ... The regional budget and finance officer acting as regional insurance officer serves as secretary of the committee."

Rule 500 of the same Rules provides in part that:

> "The Surveillance Committee is composed of ... a member and an alternate member designated by the retired staff members ... The term of office of each member and alternate is two years."

As from 1992 the two retiree representatives on the Regional Surveillance Committee had been nominated by the President of the United Nations Pensioners' Association (UNPA) in India, each time for a two-year period. The complainant was President of that Association in 1996. In a letter of 5 February 1996 to the insurance officer of the Health Insurance scheme he nominated himself and another retiree as representatives on the Committee for 1996-97. As secretary of the Committee, the insurance officer bypassed those nominations and reappointed the two retirees who had been representatives on the Committee up to 1995.

During an exchange of correspondence with SEARO the complainant asked the Regional Director how SEARO intended arranging WHO retiree representation on the Committee for 1998-99. Writing on his behalf the Director of Administration and Finance told him in a letter of 4 September 1997 that the Regional Office would "be communicating directly with retirees" to obtain nominations. In a reply of 3 October 1997 the complainant suggested that SEARO should adopt the procedure used to elect representatives to the WHO Staff Pension Committee. On 20 October 1997 the secretary of the Regional Surveillance Committee sent out a memorandum to all retired staff members in the region asking for nominations of a member and alternate member for 1998-99. It said retirees were free to propose the names of any retired WHO official. It is the nomination procedure described in that memorandum that is under challenge.

On 3 November 1997 the complainant notified the regional Board of Appeal of his intention to appeal against the memorandum. Having received no request from the Board to submit his formal appeal he wrote to the Director-General on 9 February. The Regional Director replied to him on 18 February on the Director-General's behalf attaching a report of the regional Board of Appeal dated 20 January 1998 holding that his appeal was not receivable as he was no longer a staff member. The Regional Director nevertheless said he was asking the Board to contact the complainant for his completed appeal documentation. In a fax of 16 March 1998 the complainant asked the Regional Director to waive appeal to the headquarters Board and allow him to go directly to the Tribunal. He refused in a reply of 25 March. By a letter of 21 May the secretary of the regional Board of Appeal asked him to file a full statement of appeal within fifteen days. On 25 May he filed his complaint with the Tribunal.

B. The complainant pleads that the procedure adopted for nominating representatives of retired officials to the Surveillance Committee for 1998-99 was "faulty and subjective". The secretary had no authority to conduct the election of the representatives. Rule 520 of the Staff Health Insurance Rules, which defines the responsibilities of the Committee and thereby the mandate of the secretary as well, makes no provision for him to do so. The procedure was flawed because the names of the two previous representatives appeared in the opening sentence of the memorandum of 20 October 1997 calling for nominations: that was tantamount to a recommendation to nominate them. The retirees so elected to the Committee should be removed and a new election held for 1998-99. The Association of Former WHO Staff Members in South-East Asia was established in 1995 and the complainant was elected president. SEARO, he says, should offer "basic facilities" to the Association so that it can carry out the task of nominating the representatives of the Surveillance Committee.

He contends that the internal appeal proceedings were flawed too. The secretary of the regional Board of Appeal did not apply the Rules of Procedure correctly or "guide" the proceedings properly. He misled the complainant and let the matter drag on. He was not impartial. There was connivance between him and the secretary of the Surveillance Committee. The Board was "unconstitutionally constituted" and submitted its recommendation to the Regional Director without "any input" from the complainant. There was no "express decision" in the Regional Director's letter of 18 February 1998 and as the matter was pending the complainant lodged his complaint with the Tribunal.

The secretary was wrong not to heed his suggestion, put to the Regional Office on 3 October 1997, to follow a "duly established, universally accepted and adopted democratic procedure" by electing representatives of retirees in the same way as representatives of participants in the Pension Fund are elected to the WHO Staff Pension Committee.

He points out that he made attempts to resolve the whole matter through discussion with the Administration, and had asked unavailingly for a meeting with the Regional Director. A meeting he had with the Director of Administration and Finance on 27 April 1998 resolved nothing as the Director only defended the standpoint of the Organization on the issue.

The complainant seeks the setting aside of the nomination procedure given in the memorandum of 20 October 1997 and the quashing of the illegal nominations. He calls on the Tribunal to "direct" the Organization to ask for nominations for the Committee for 1998-99 either "as per the procedure already adopted at WHO/[headquarters] from the WHO retirees association" or "as per the established procedure followed for the election of participants' representatives for WHO Staff Pension Committee". He requests the Tribunal to ask the Organization to "issue suitable instructions for strict adherence to the rules ... and established procedures which include the internal recourse process". He claims 25,000 United States dollars in damages for moral injury and 2,500 dollars in costs.

C. The Organization claims that the complaint is irreceivable under Article VII of the Tribunal's Statute for failure to exhaust the internal means of redress open to the complainant. He "ignored" the request of 21 May 1998 from the secretary of the regional Board to file a full statement of appeal. There is no "final" decision to appeal against to the Tribunal. In challenging a memorandum of 20 October 1997 his complaint is also out of time.

Furthermore the complainant is not challenging an administrative action or decision constituting breach of the terms of his former contract which is appealable under the Staff Regulations or Rules. Neither is he challenging a decision taken by the Surveillance Committee about the settlement of a claim which affects him as an individual and would infringe the Staff Health Insurance Rules. He is challenging an election procedure in order to safeguard "the interests of the present and future retirees of WHO in South East Asia". As no appeal involving collective interests lies to him under those Rules the memorandum setting out the procedure was not a challengeable decision.

His complaint is also devoid of merit. That memorandum contained no recommendation to nominate the two representatives mentioned, so the procedure was not flawed. The Organization chose a "fair and democratic" process. The choice of representative lay with the retirees: the secretary had no vote.

Retirees are not members of the WHO Staff Pension Committee, so its election procedure is irrelevant. The Staff Health Insurance Rules do not lay down a procedure for appointing representatives of retirees to the Surveillance Committee. No association the defendant knew of could have conducted the election as none represented a significant number of WHO retirees. It breached no rule in 1995 in turning down the complainant's request for facilities for the new Association of Former WHO Staff Members and the complainant did not challenge that decision at the time.

The Organization rejects the complainant's plea that the secretary of the regional Board of Appeal misinformed him: in any case his allegations are unsubstantiated and irrelevant.

It refutes the complainant's suggestion that it acted improperly by not resolving the whole matter amicably: it did conduct lengthy correspondence with him. The Director of Administration and Finance also met him twice, but on those occasions the complainant maintained his request to be nominated and replace a current member of the Committee.

D. In his rejoinder the complainant enlarges on his pleas. He contends that his complaint is receivable. Being a retiree he filed it under Article II, paragraph 6(a) of the Tribunal's Statute. What he is challenging is an administrative action taken by the secretary of the Surveillance Committee: his issuing the challenged memorandum of 20 October 1997 was gross misuse of authority. At issue are his own rights, but in filing his complaint he is acting in the "collective interests of present and future retirees", and as the representative of the retirees.

It was up to the UNPA to nominate retiree representatives: a formal agreement existed between the SEARO Administration and the Association for it to do so, and had existed since before 1990 when SEARO asked the president of UNPA to designate an observer to the Surveillance Committee. There was connivance between the Organization and "unscrupulous individuals" in the nomination process, and connivance later on between the secretaries of the Surveillance Committee and the Board of Appeal.

He rebuts the suggestion in the Organization's reply that he asked the Director of Administration and Finance to support his nomination to the Surveillance Committee. It was "mischievous" of the Organization to suggest that he did. The allegation was an attempt to malign him and harmed his reputation and he therefore claims an additional 25,000 dollars in damages for moral injury. He also requests the Tribunal to ask the Organization to produce documents previously requested by him, including copies of correspondence exchanged between SEARO and UNPA between 1990 and 1995.

E. In its surrejoinder the Organization points out that as the complainant is challenging the memorandum of 20 October 1997 the sole issue turns on whether, in issuing it, the Organization infringed the Staff Regulations, Staff Rules or Staff Health Insurance Rules. It asserts that it did not.

The WHO contests the collective nature of his complaint: inasmuch as the complainant filed it on behalf of WHO retirees it is irreceivable. The additional claim for damages put forward in the rejoinder is also irreceivable.

The issuing of the memorandum of 20 October 1997, the defendant maintains, was not illegal. First, the terms of Staff Health Insurance Rule 500 do not require that the designation of retirees should be conducted through an association, let alone through any particular association, nor does that Rule make any particular provision for their election. Secondly, the UNPA includes retired officials from other organisations: consultation in the nomination process between its president and WHO retirees had simply been a way of ensuring that the wishes of the latter were taken into consideration. The memorandum at issue allowed the consultation process to be formalised. Thirdly, the defendant reiterates that it was not aware of a separate WHO association in the region that had "come effectively into operation", had been endorsed by a "fair number" of WHO retirees and so could have designated the retirees. The complainant has adduced no evidence that such an association existed before 20 October 1997.

Before circulating the memorandum the SEARO insurance officer did enquire about nomination procedures in headquarters and at various regional offices.

The Organization further denies that a formal arrangement ever existed between SEARO and the UNPA, vesting in the president of UNPA the authority to designate retiree representatives to the Surveillance Committee. By not giving effect to the complainant's nomination of himself, in his capacity as president of UNPA, there was no infringement of a formal arrangement, as none existed.

CONSIDERATIONS

1. Since 1990 the Staff Health Insurance Rules have allowed representatives of retired staff members to become members of the Staff Health Insurance Surveillance Committees both at headquarters and in the regions. The Rules provide for representation by one retired member and one retired alternate member. The complainant is a former staff member of the WHO's Regional Office for South-East Asia (SEARO) who retired on 1 April 1992 and was the president of the United Nations Pensioners' Association in 1996. In February of that year he nominated himself as a retired member of the Surveillance Committee for the South-East Asia Region for 1996-97. The complainant also became president of an association established in December 1995 called the Association of Former WHO Staff Members in South-East Asia; he informed the insurance officer in a letter of 14 March 1996 that, in future, nominations for the Surveillance Committee would be made by that Association. However, on the basis of proposals from 60 per cent of WHO retirees stationed in Delhi the insurance officer accepted the nomination of the existing member and alternate member to continue representing the retirees for the years 1996-97. The complainant was so informed on 19 June 1996.

2. Protracted correspondence followed including a letter of 3 October 1997 from the complainant in which he took note that the Regional Office would communicate directly with the retirees to obtain nominations for WHO retiree representatives to the Regional Surveillance Committee for 1998-99. On 20 October 1997 the secretary of the Surveillance Committee sent out a memorandum to all retired staff members in the region inviting them to nominate two persons and enclosing a ballot paper. The results of the ballot were sixty-two votes in favour of the outgoing member, fifty-five

votes in favour of the outgoing alternative member and four votes for the complainant.

3. On 3 November 1997 the complainant filed notice of his intention to appeal to the regional Board. He identified the contested administrative decision as the memorandum of 20 October 1997.

4. On 20 January 1998 the Board, without hearing the complainant, recommended to the Regional Director that the appeal be dismissed as irreceivable because the complainant had ceased to be a staff member. However, that recommendation was rejected by the Regional Director, who remitted the matter to the Board asking it to obtain complete documentation and issue a new report. In a letter of 18 February 1998 the Regional Director so informed the complainant.

5. On 16 March 1998 the complainant wrote to the Regional Director criticising the secretary of the Board and asking for his removal. On the same day he wrote to say that the instructions to the Board to proceed further would "go against the spirit of the established rules and would therefore be bad in law". As the Director-General had not responded to his request for waiver of the internal proceedings with the headquarters Board of Appeal he asked the Regional Director to do so and allow him to file a complaint directly with the Tribunal. He also suggested a personal meeting to settle the matter out of court.

6. In a letter of 25 March 1998, the Regional Director declined to agree to his request for waiver. He suggested the complainant could arrange a meeting with the Director of Administration and Finance with a view to settling the matter.

7. On 27 April 1998 the complainant duly contacted the Director of Administration and Finance, who arranged a meeting for the same day, but this meeting did not result in settlement.

8. The complainant wrote to the Regional Director on 28 April 1998 stating that given his discouraging treatment he proposed filing a complaint immediately with the Tribunal. The regional Board of Appeal replied by a

letter of 21 May 1998 requesting the complainant to file a statement of appeal within fifteen working days after 25 May 1998.

9. On 25 May 1998 the complainant filed his complaint under Article VII(3) of the Statute of the Tribunal. Under item 3 of the complaint form where the challenged decision is identified, he specifies the date on which he notified his claim as 3 November 1997, the date on which he sent notification of his intention to appeal to the regional Board of Appeal.

10. On 26 May he informed the Regional Director that he had proceeded as he had proposed in his letter of 28 April 1998 and had already filed a complaint directly with the Tribunal. The letter of 21 May 1998 from the regional Board of Appeal was consequently irrelevant and he was ignoring it.

11. The relief sought by the complainant is as follows:

> "1. To set aside the procedure contained in the memorandum dated 20 October, 1997 to WHO retirees in the South-East Asia region.
>
> 2. To declare nominations of individuals resulting from the application of illegal procedure and conducted by an unauthorized person as null and void and their removal from the Regional Surveillance Committee forthwith.
>
> 3. To direct the Organization to seek nominations of WHO retirees representatives on WHO [Staff Health Insurance South-East Asia] Regional Surveillance Committee for the years 1998/99: (a) as per the procedure already adopted at WHO [headquarters] from the WHO retirees association, (b) alternatively conduct the elections for 1998-1999 as per the established procedure followed for the election of participants' representatives for WHO Staff Pension Committee as suggested by the complainant in his letter of 3 October 1997 addressed to the Director [Administration and Finance].
>
> 4. To ask the Organization to issue suitable instructions for strict adherence to the rules and relevant provisions and established procedures which include the internal recourse process.
>
> 5. The complainant be paid damages for humiliation, continued mental and physical stress to the tune of US$25,000.
>
> 6. The complainant be also paid administrative costs of US$2,500."

In addition, in his rejoinder he asks for an additional 25,000 dollars in damages for moral injury and the production of certain documents by the Organization.

12. In challenging the validity of the memorandum of 20 October 1997 the complainant contends that:

(1) The Organization ought to have sought nominations from the "legally constituted UNPA and the Association [of former WHO Staff Members in South East Asia]".

(2) Members should have been designated in the same manner as at headquarters.

(3) The authority for the establishment of the Surveillance Committee rested with the Regional Director; the secretary of the Surveillance Committee was not empowered to conduct elections.

(4) The memorandum demonstrated personal prejudice in that it contained the names of the outgoing member and alternate member, thereby impliedly recommending them for nomination.

(5) The manner in which the ballots were opened was illegal.

He also challenged the validity of the designation of the retirees' representatives throughout the years 1990-97.

13. It is the opinion of the Tribunal that the Staff Health Insurance Rules do not require the designation of retirees' representatives to be carried out by an association. They make no provision for the manner in which such representatives should be chosen and in particular they do not specify that it should be done in the same way as at headquarters. The authority to establish the Surveillance Committee rests with the Regional Director. The secretary of the Committee issued the memorandum of 20 October 1997 following the Regional Director's of 4 September 1997 to contact retirees individually with a view to selecting their representatives. The secretary did not therefore act without authority. In any event the complainant, by his letter of 3 October 1997, acknowledged the decision to communicate directly with the retirees. There is no credible evidence that the memorandum demonstrated personal prejudice.

14. The ballot papers were opened and counted in the presence of the Director of Administration and Finance, the secretary of the Surveillance Committee, a member of the committee representing serving staff and an administrative assistant of the Staff Health Insurance scheme. On scrutiny

of 102 ballot papers received, 17 were declared invalid. The balance of 85 ballot papers was counted and a record was made of every vote. The complainant's allegation that the manner in which the ballot papers were opened was illegal cannot be sustained.

15. The complainant's view that the procedure for designating representatives of retirees to the Surveillance Committee should be different is irrelevant as there has been no breach of the Insurance Rules. There was no personal prejudice on the part of the secretary of the Committee. Therefore the complainant is not entitled to succeed on the substantive issue in this complaint. With regard to the flaws alleged in the internal appeals procedure, the complainant has not suffered prejudice since his right to abandon his internal appeal and come directly to the Tribunal has been upheld. As he has not succeeded in his complaint any delay involved has not caused him prejudice.

16. Since the complaint fails on the merits there is no need to consider its receivability.

17. Two applications to intervene in this complaint have been received from Mr Jogindar Singh Battra and Mr Devendra Nath Sethi. Since neither of them has shown that they are in the same position in fact and in law as the complainant, apart from being retirees of SEARO, their application to intervene is refused.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Mark Fernando, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

MARK FERNANDO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SEVENTH SESSION

In re **Serlooten (No. 2)**

Judgment 1877

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Gérard Serlooten against the International Telecommunication Union (ITU) on 2 November 1998 and corrected on 9 December 1998, the ITU's reply of 14 January 1999, the complainant's rejoinder of 12 February, and the Union's letter of 15 March 1999 informing the registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The career of the complainant at the ITU is set out in Judgment 1679 of 29 January 1998, in which the Tribunal ruled on his first complaint. He left the Union on 31 December 1997 on taking his retirement.

The complainant held grade P.4 until 31 December 1994, when he asked to return to the General Service category – to which he had initially belonged – at grade G.7, as from 1 January 1995, while continuing to perform the same duties. He contested certain details of this change of category, especially the refusal to grant him a special post allowance at grade P.4, and he filed a complaint with the Tribunal to obtain this allowance. In Judgment 1679, mentioned above, the Tribunal allowed the complainant's claim and ordered the payment of the allowance in question as from 1 January 1995.

Following that Judgment, the complainant submitted a series of requests to the Personnel and Social Protection Department on questions related to education grants, home leave and repatriation grants. In particular he asked that leave he had taken in France - his country of origin - from 10 to 25 July 1997, should be considered as home leave. By a letter of 13 March 1998, the Secretary-General informed him of the decisions taken in application of Judgment 1679. He told him that his requests in respect of education grant and repatriation grant had been admitted, but that the request concerning home leave could not be granted. The Secretary-General based this last decision on the fact that under Staff Rule 5.3.1, the leave in question was only granted if the staff member continued to work for the Union for at least six months beyond the date of his return from home leave. This condition was not fulfilled by the complainant, since he had taken retirement on 31 December 1997.

In a memorandum of 23 March 1998, the complainant asked the Secretary-General to reconsider his decision, but the Secretary-General maintained it and on 4 May the complainant submitted an appeal to the Appeal Board. The report of the Board, delivered on 13 July 1998, contained two recommendations: one came from two members of the Board who declared themselves in agreement with the Secretary-General, and the other, from the third member, who recommended that the complainant's request be granted. In a letter of 4 August 1998 the Secretary-General told the complainant that he had decided to endorse the majority recommendation of the Appeal Board. That is the impugned decision.

B. The complainant has two pleas.

First, the defendant has acted contrary to the principle of good faith. In the complainant's view it is paradoxical that the Union should now refer to a regulation in support of its arguments which, despite his express requests, it had earlier denied was applicable to him thus obliging him to turn to the Tribunal. Had the Union admitted from the start that the complainant could benefit from the special post allowance and advantages deriving from the post he effectively occupied, he would have been able, in 1997, to comply with the regulations governing Professional category staff members, and in particular, fix the dates of his leave in accordance with the time scale stipulated in Rule 5.3.1 of the Staff Regulations. However, the complainant's status was only firmly established following Judgment 1679.

Secondly, the execution of Judgment 1679 was incomplete. In this connection, the complainant contends that full execution of the Judgment would involve granting him all the advantages which he would have enjoyed had his request for special post allowance been accepted at the time of the decision to allow him to return to the General Service category. He believes that home leave is one of these advantages and, in so far as his right to it had been recognised retroactively, he ought to be able to benefit from it irrespective of the application of Rule 5.3.1.

The complainant asks the Tribunal to set aside the decision of 4 August 1998, to order the ITU to pay him the leave in question and to award him 4,000 Swiss francs in costs.

C. The Union asserts that the complainant's argument that Rule 5.3.1 is not applicable to him is illogical. Indeed, in granting him a special post allowance at grade P.4, the Tribunal based its judgment on the fact that he had continued, since 1 January 1995, to perform Professional category staff duties, in spite of his return to the General Service category. It was precisely because the complainant had, by virtue of the special post allowance, once again entered the Professional staff category, with retroactive effect as of 1 January 1995, that he could claim to benefit from rights granted to staff of that category. Obviously, these rights were subject to the conditions laid down in the Staff Regulations. As far as home leave was concerned, the conditions stipulated under Rule 5.3.1 had not been fulfilled in respect of the leave taken by the complainant from 10 to 25 July 1997 inasmuch as he had taken retirement on 31 December 1997.

The defendant believes that the complainant's plea whereby Judgment 1679 has not been fully executed is superfluous. It does not contest that the main thrust of that Judgment was to restore all the complainant's rights as a staff member performing the duties of Professional category staff. Home leave is among those rights. But, in the exercise of this right, the Staff Rules stipulate a restrictive condition, and the defendant sees no reason why the complainant should be exonerated from this condition.

D. In his rejoinder, the complainant notes that, since in 1997 he was still only at grade G.7, to refuse him home leave was taking him to task for failure to respect a Staff Rule which at the time was not applicable to him.

He maintains that the Tribunal has only one issue on which to decide – whether his "re-entitlement to the rights of Professional category staff does not imply setting aside the time limit contained in Rule 5.3.1, given that the *a posteriori* application of this rule made it impossible [for him] to respect it retroactively".

CONSIDERATIONS

1. The complainant was employed by the ITU from 1 May 1961 until 31 December 1997, when he retired. The facts at the basis of the present case can be found in Judgment 1679, delivered on 29 January 1998. He entered the General Service category at grade G.4, and was regularly promoted; from 1982 he performed the duties of a post that was graded P.2 in the Professional staff category, with a special post allowance. He was promoted to P.2 on 1 July 1986 and to P.4 on 1 November 1994. As from 1 January 1995, he returned to the General Service category, at grade G.7, in order to avoid the negative consequences of his promotion to the Professional category on his retirement expectations, which would otherwise have been less favourable.

At its 1995 session the Council of the Union had expressed concern at the unfavourable treatment as to pension, and pay as well, of staff who had been promoted from the General Service to the Professional category. The Council had asked the Secretary-General to tackle the problem. After consulting the working party, the Secretary-General, in a letter of 12 December 1995, allowed the complainant to choose between remaining in the Professional category and returning to the General Service category; on 13 December 1995 the complainant chose the latter. However, the parties disagreed over the consequences of the choice. The ITU asked the complainant to return the difference in pay between P.4 and G.7 for 1995 and refused to allow him a special post allowance pursuant to Article 3.8 of the Staff Regulations.

In Judgment 1679, the Tribunal found refusal of this post allowance to be unlawful. However, it found that the staff member could not for one and the same period get both the pay of a P.4 grade and a special post allowance for having performed duties and assumed responsibilities corresponding to that grade.

2. After that Judgment, which only concerned the provision of the special post allowance, the ITU believed that the complainant was to be considered as a Professional category staff member. He does not contest this.

Moreover, he enjoyed the benefits pertaining to this category. However, the Secretary-General refused to recognise as home leave a journey he undertook to his home country in 1997, on the ground that he did not fulfil all the conditions; under Staff Rule 5.3.1, this leave is subject to the staff member remaining in the service of the Union for at least six months after the date of return from home leave; in this instance, the complainant returned on 25 July 1997, and then took his retirement on 31 December 1997.

The complainant does not challenge the existence of the rule, but asserts that the time limit therein is not applicable to him, since he could not have known before the date of the Judgment of 29 January 1998 that he would be considered as a Professional category staff member, and that Rule 5.3.1 would thereby become applicable to him. He had thus not been able to adapt his actions accordingly. Had he known the rule would be applicable to him, he would have taken his holiday in the first six months of 1997. His claim should be granted on the grounds of his good faith.

The Union bases its reasoning on the lawfulness of the Administration's action, and equality of treatment for staff members.

By a majority decision the Appeal Board recommended dismissing an appeal filed by the complainant, although a minority had found in his favour. The Secretary-General confirmed his decision to dismiss the appeal. The complaint came before the Tribunal, with both parties pressing their pleas.

3. The ITU rightly asserts that out of respect for the lawfulness of the Administration's action and the equality of treatment of staff it is obliged to respect rules prescribing time limits (see Judgment 1502, *in re* Baillon, under 6 and the judgments cited therein). However, both organisation and staff members are each required to respect the rules of good faith (see Judgment 1756 *in re* Awoyemi, and the judgments cited therein), especially in cases of respect for time limits. "If an organisation wants to put procedural restrictions on one of the staff member's rights or on the exercise thereof it must draft clearly enough to avoid setting traps. If it fails to do so, the text may be construed in the staff member's favour" (see Judgment 1502 under 6). The Tribunal also noted that the time limit for claims must start "at the date at which payment becomes due. If that were not so, the lapse of time would work to the claimant's detriment for as long as the rules precluded his making the claim" (see the same Judgment under 9).

4. (a) The Union's argument, based on the lawfulness of the Administration's action, assumes that the context in which the rule is applied to the staff member's case is clear, coherent and sufficiently understandable.

This was not the case at the time the complainant chose the date of his holidays. The ITU Council detected an anomaly in the Staff Regulations and asked the Secretary-General to tackle the problem. The executive bodies of the Union thus already admitted that there were shortcomings which had to be rectified (see Judgment 1679, under C and E: "there was no precedent for the offer", "an offer that was made outside the context of the rules"). When the administrative authority rectifies the shortcomings of a regulation applied to a staff member in good faith it cannot subsequently apply to the latter a rule restricting his rights by imposing a time limit of which he could not previously have been aware.

(b) Moreover, before the issuing of Judgment 1679, both parties considered the complainant as a General Service staff member, and as such not entitled to home leave allowance under rules applicable to Professional category staff.

(c) There is no evidence to suggest that the staff member was to blame for not knowing that the rule at issue could be applied to him. Its terms should not allow for any ambiguity. While it may certainly be difficult to draft rules which do not need to be rectified subsequently, an organisation should not allow staff members to suffer the full consequences of such shortcomings.

(d) The restrictive rule as applied after the event, was insufficiently clear for a staff member in the complainant's position, when taking leave, to make his choices accordingly.

(e) Under Rule 5.3.1 right to home leave is lost if it is not taken before the beginning of the six-month period preceding termination of the staff member's duties. The time limit was not respected by the complainant in this instance, but through no fault of his own, since he was unaware that this rule could be applied to him, and that he could be penalised for failure to observe the time limit. Had he been previously informed, he would have been able to take his leave during the first six months of 1997. The complainant is to be believed when he asserts that he would have availed himself of this possibility.

In the circumstances, the rules of good faith, as referred to above, overrule the limitative regulation in the complainant's case, and he shall be granted home leave for 1997, irrespective of the moment when he took his leave (see also Judgments 966, *in re* Maugis No. 2, under 9, and 997, *in re* Maugis No. 4, under 8).

5. The complaint succeeds: the complainant is awarded costs.

DECISION

For the above reasons,

1. The contested decision is set aside.
2. The Union shall pay the complainant the amount due to him for his home leave ending on 25 July 1997.
3. It shall pay him 3,000 Swiss francs in costs.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

***In re* Limage (No. 3)** **Judgment 1878**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs Leslie Limage against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 18 August 1998, UNESCO's reply of 8 October, the complainant's rejoinder of 23 November 1998 and the Organization's surrejoinder of 29 January 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The background to this case is set out in Judgment 1639 of 10 July 1997 on Mrs Limage's first complaint.

In that judgment the Tribunal set aside a decision of the Director-General of 4 October 1996 confirming her summary dismissal on the grounds of her behaviour towards another staff member, Mr Rissom, on 17 May 1995. Thereafter the Director of the Bureau of Personnel wrote to the complainant on 4 August 1997, asking her, within seven days, to "show cause" why under the Staff Regulations and Rules "an appropriate disciplinary measure" should not be taken against her on account of her serious misconduct towards the staff member in 1995, as reflected in a "note for the record" produced by him, and which was appended to the letter. The Director also informed her that the Director-General would take an appropriate decision as soon as the complainant's reply was received, or, if no reply was received, within seven days, and would communicate it to her.

The complainant replied by a letter of 11 August 1997, within the time allowed, and gave her comments on the incident of 17 May 1995. By a letter of 9 September 1997 the Director of Personnel wrote to the complainant on the Director-General's behalf, briefly recapitulating the incident and summarily dismissing her, for a second time, with effect from 15 September or the date on which she received the letter, whichever was the earliest. She says she received the letter on 10 September.

On 11 September the complainant sent a letter of protest against that decision to the Director-General. By a further letter to him of 8 October, she asked for permission to appeal directly to the Tribunal, as her first and second summary dismissals were "virtually identical" and the Appeals Board had already issued an opinion "on the substance". She received no response to either letter.

The complainant lodged an internal appeal with the Appeals Board on 20 November 1997. The Board heard her case on 31 March 1998 and reported on 23 June, unanimously recommending to the Director-General that he should "reconsider his decision of the summary dismissal" and "impose on [the complainant] a lesser penalty".

The Director-General told the complainant in a letter of 12 August 1998 that he was upholding the decision to summarily dismiss her communicated to her on 9 September 1997. That is the decision under challenge.

B. The complainant's first plea is that UNESCO acted in breach of due process, and the decision to summarily dismiss her was flawed. The letter of 4 August 1997 from the Director of Personnel did not specify the charges against her. It betrayed the intention of the Director-General to dismiss her even if she did not reply within the seven-day time limit imposed. Her guilt was assumed in advance as the letter invited her to "show cause" why a disciplinary action should not be taken against her. The sole document attached was a note written for his personal records by Mr Rissom. A document cited as further corroboration from another witness, the official's secretary, was not enclosed with the letter and in any case was drafted and signed one year after the event. Citing the case law she observes that even in the absence of a statutory text to that effect a staff member has the right to the due process of law. Her right to defend her case was denied and she did not have an opportunity to participate in the examination of the evidence.

The letter of 9 September 1997 informing her she was summarily dismissed contained new allegations. It stated that the altercation with Mr Rissom on 17 May 1995 took place in public, whereas it occurred in the privacy of an office. The letter wrongly says she called him a "Nazi". He has never claimed that she did, and that new allegation should have been entered on a "charge sheet" and communicated to her.

Secondly, she pleads that there was breach of the principle of proportionality. Summary dismissal was a sanction disproportionate to the nature of the incident: particularly so, as her first summary dismissal had been quashed by the Tribunal in Judgment 1639. No grounds were given for qualifying her behaviour as "serious misconduct".

Subsidiarily, she points to procedural irregularities in the internal appeal process and delays caused by staff changes in the secretariat of the Appeals Board. The geographical distribution requirements in the composition of the Board were not respected. Furthermore, although the Board met on 31 March 1998 it produced its report only on 23 June. To avoid "harsh treatment and delay" she should have been allowed to bring her case directly to the Tribunal.

She asks the Tribunal to quash the decision of 12 August 1998; reinstate her in her former post or an equivalent one from the date of dismissal; award payment of the salary, allowances and benefits she would have been entitled to from the date of dismissal until the date of reinstatement, "including interest which would have accrued during the period and leave entitlements"; order the recalculation of her pension entitlements; award her 400,000 United States dollars in damages for material and moral injury and 4,000 dollars in costs.

C. In its reply the Organization gives examples of earlier incidents which in its view are evidence of the complainant's inappropriate behaviour. It asserts that the complainant knew full well the charges against her. At no time did she contest any part of Mr Rissom's "note for the record" appended to the letter of 4 August 1997. The complainant had previously had knowledge of his secretary's corroborative testimony: it had been communicated to her at the time of her internal appeal.

There was no foregone conclusion of guilt. In the letter of 4 August to her from the Director of Personnel, the Director-General provided the complainant with an opportunity to present her case before he took a decision on the matter. *Prima facie* there was evidence of serious misconduct: it was up to the complainant to "present her case in complete defence or in mitigation". She did not deny that the incident had occurred as described by the staff member.

The Organization quotes Staff Rule 110.2(a) which reads:

> "No disciplinary measure, other than summary dismissal or written censure under Regulation 10.2 or termination under Regulation 9.1.1, shall be imposed on a staff member until the case has been referred by the Director-General to a Joint Disciplinary Committee for advice and until he has considered its advice. ..."

The complainant's right to present her case did not mean she should be heard by a Joint Disciplinary Committee, as under the Staff Rules referral to the Committee is not necessary in a case of summary dismissal. The Director-General "had the right to take a decision on her case" whether or not she chose to put forward any arguments in her defence, and so he imposed a seven-day time limit for her reply.

The proportionality of the disciplinary measure to the offence is a matter falling within the discretionary authority of the Director-General. He considered her conduct warranted summary dismissal. The decision of 9 September 1997 to dismiss her was taken "within the framework of his discretionary authority".

Her accusation against the staff member was all the more serious as, by virtue of Staff Regulation 4.2.1, the Director-General is under a legal obligation to make sure that "persons with a fascist or Nazi past" are not appointed to the secretariat or maintained in service after any such involvement is discovered. She does not dispute calling Mr Rissom "a fascist" which, says the Organization, is tantamount to calling him a "Nazi".

The complainant's argument that the verbal attack on Mr Rissom occurred in private is without merit: it took place on UNESCO premises and was witnessed by others, in offices to which the public had access.

The UNESCO Appeals Board operates independently of the Administration. The complainant cannot ascribe to the Administration any delay on the part of the Board, or the manner in which it deliberates. Besides which, she has not shown that she suffered any prejudice as a result of the delay: in fact she benefited as her case was heard on 31 March 1998 instead of later on in the summer. There was a correct balance in the geographical distribution of the Board.

D. The complainant reiterates her pleas in her rejoinder and maintains her claims.

She reproaches the Organization for "character assassination" and "misinformation" in its reply: the earlier incidents it cites involving the complainant can have no bearing on her second dismissal, as the letter of 9 September 1997 by which she was dismissed does not refer to them.

UNESCO relies solely on the note for the record written by Mr Rissom to justify her second summary dismissal. That document was, however, discredited in the first internal appeal process.

She reiterates her view that she should have been allowed to come directly to the Tribunal.

E. In its surrejoinder the defendant contends that summary dismissal was a justified measure. It did respect the complainant's right to due process: after receiving Judgment 1639 the Director-General started a new decision-making process and re-examined the facts surrounding the complainant's attack on Mr Rissom. The complainant was given a reasonable time in which to defend herself. It is untrue that Mr Rissom's note was "discredited two years earlier". His secretary's testimony was asked for a year after the event because it was only at the time of her first internal appeal that the complainant had queried Mr Rissom's memory of the incident at issue.

The refusal to waive the Appeals Board's jurisdiction in order to allow the complainant to go directly to the Tribunal was not arbitrary. There was not complete agreement on the exactness of the material facts and so one of the conditions for waiver was not met. The Board which heard her second internal appeal was correctly constituted.

CONSIDERATIONS

1. By Judgment 1639 of 10 July 1997 the Tribunal set aside the decision of the Director-General of 4 October 1996 summarily dismissing the complainant and the matter was remitted to the Director-General for a new decision in accordance with due process. The facts leading to the impugned decision are set out in that judgment. There was also a further judgment, No. 1748, concerning the execution of Judgment 1639.

2. On 4 August 1997 the Director of the Bureau of Personnel wrote to the complainant asking her to "show cause" within seven days of receipt why an appropriate disciplinary measure should not be taken against her following her serious misconduct towards Mr Rissom, as reflected in his "note for the record" of 19 May 1995, a copy of which was annexed. The Director said that Mr Rissom's note had been "corroborated in its essential particulars" by his secretary. He added that the Director-General would take an appropriate decision upon receipt of her reply or, if none was received, within seven days. Mr Rissom's note gives an account of events starting on 27 April 1995, with particular emphasis on an incident on 17 May 1995 and a phoned apology that evening.

3. The complainant replied on 11 August 1997 saying that due process entitled her to know the charges against her, to examine and evaluate the evidence, to provide evidence and receive an impartial hearing. She complained that since the note of 19 May replaced a proper "charge sheet" and the secretary's evidence had not been communicated to her, she was entitled to consider the case as being based solely on Mr Rissom's note. She claimed she was emotionally disturbed following a ceremony commemorating the 50th anniversary of the Holocaust. Her undenied loss of self control was a result of her emotional state and she had not intended to insult Mr Rissom or hurt his feelings. She offered her apologies by telephone that evening and again next morning. He accepted them in a note of 19 May 1995 and said he would seek no sanction against her. The complainant pointed out that neither the Organization's Staff Regulations and Rules nor the Tribunal's jurisprudence provided a definition of serious misconduct.

4. By a letter dated 9 September 1997 the Director of Personnel informed the complainant that the Director-General had taken into consideration her reply of 11 August 1997. The Director noted that she did not deny having insulted Mr Rissom and said the Director-General had concluded that her conduct constituted extremely serious misconduct. She had unjustifiably accused Mr Rissom repeatedly of being a fascist and a Nazi while giving the Nazi salute and shouting "Heil Hitler, Mr Rissom". She quoted Staff Regulation 1.4 which says that staff members are required to "conduct themselves at all times in a manner befitting their status as international civil servants" and in particular "they shall at all times bear in mind the reserve and tact incumbent on them by reason of their international status". She said her wanton attack reflected very adversely on her status as an international civil servant. She referred to Staff Regulation 4.2.1 which required the Director-General to ensure that no person with a fascist or Nazi past was appointed or maintained in service if such a past was discovered after recruitment. Consequently, for her to accuse a colleague of being a fascist and a Nazi and then to repeat the allegation without a shred of evidence constituted extremely serious misconduct which disqualified her from remaining a staff member. She was dismissed summarily with effect from 15 September 1997 or the date of receipt of the letter, whichever was earlier.

5. On 11 September 1997 the complainant lodged a protest with the Director-General under paragraph 7(a) of the Statutes of the Appeals Board. On 8 October 1997 she asked for permission to appeal directly to the Tribunal under Staff Rule 111.2. Having received no reply to either of her letters, she appealed against the decision of 9 September 1997 to the Appeals Board on 20 November 1997. Her detailed submissions were not transmitted to the Office of International Standards and Legal Affairs until 10 December. A copy of the Organization's detailed reply dated 31 December 1997 was not sent to the complainant until 5 March 1998. The appeal was heard on 31 March. After the hearing the chairperson left the UNESCO headquarters without agreeing to a draft report. The report of the Appeals Board was completed only on 23 June 1998 and was received by the complainant on 29 June.

6. The Appeals Board was unable to reach a unanimous opinion on the question of due process. The chairperson was of the opinion that the complainant should have been allowed to appeal directly to the Tribunal. He said Regulation 10.2 did not vest uncontrolled power in the Director-General without recourse to the disciplinary procedure. Therefore, summary dismissal was a violation of due process. Reliance on Staff Regulation 4.2.1 was irrelevant and misplaced and was not even mentioned in the Director of Personnel's letter of 4 August 1997 or in the earlier proceedings.

7. Two members were of the opinion that the wording of the letter of 4 August constituted a denial of due process as it implied that a decision had already been taken. One of those two members recommended that a Joint Disciplinary Committee be set up.

8. Two other members considered that the letter of 4 August, together with Mr Rissom's note, fulfilled the requirement of due process and recommended that "administrative machinery" be set up to deal with future cases. One of those members felt the conflict was not an isolated incident since the complainant had previously been given a warning and she was the cause of tension. On 17 May 1995 she had entered Mr Rissom's office without invitation and insulted and railed at him. That warranted disciplinary action but not summary dismissal and the member recommended termination of appointment under Chapter IX of the Staff Regulations and Rules entitled Separation from service.

9. The Board considered her behaviour to be in breach of the obligation in Regulation 1.4 of staff members to "conduct themselves at all times in a manner befitting their status", but the Director-General had not taken into consideration that she had apologised twice and her apologies had been accepted. The extreme penalty of summary dismissal was a disproportionately heavy one. The Board unanimously recommended that the Director-General reconsider his decision and, taking into account the mitigating circumstances, impose a lesser penalty.

10. By a letter of 12 August 1998 the Director-General informed the complainant that, after examining the report of the Appeals Board and the dossier concerning the appeal, he had decided to maintain the decision for

the reasons already given in the letter of 9 September 1997 and in the Administration's detailed reply of 31 December 1997 to her appeal. That is the decision impugned.

11. The reply of the Administration is not included as part of the pleadings. The Tribunal has taken the summary in the report of the Appeals Board to be accurate.

12. The complainant seeks the quashing of the impugned decision, reinstatement, salary and allowances and other benefits, together with interest on those amounts, leave entitlements and restoration of pension rights, damages for moral and material injury, and costs.

13. She argues that the letter of 4 August 1997 contained no charge sheet, and showed that the Director-General intended to take a new decision after seven days on unspecified charges with or without her reply. No explanation was given in the letter as to why her behaviour was already qualified as "serious misconduct". The testimony of Mr Rissom's secretary was not included. The Administration attempted to justify dismissal by referring to other irrelevant matters and to show that there was a history of difficulties, but none of these matters was raised in the dismissal letter or led to any previous disciplinary action.

14. She says that the actual letter of summary dismissal of 9 September 1997 contained new allegations not mentioned in the letter of 4 August 1997 or in Mr Rissom's note. It asserts the disagreement took place in public, to which the complainant replies that a discussion within the confines of an office cannot be construed as public. The reference to Staff Regulation 4.2.1 relating to persons with a fascist or Nazi past is irrelevant to a disagreement arising from Mr Rissom's decision to halt the publication of a document on which the complainant had worked, and which already had the approval of the Director-General. She had not called Mr Rissom a Nazi. For these reasons the complainant submits that the decision is flawed by breach of due process.

15. The complainant further submits that lack of proportionality is an error of law: see Judgments 203 (*in re* Ferrecchia), 1070 (*in re* Couton) and

1271 (*in re* Sánchez Peral). According to the Tribunal's jurisprudence, a sanction out of porportion to the subjective and objective nature of the offence is a mistake of law and since the decision is flawed it must be quashed. The complainant refers to cases where the material or moral interests of an international organisation were jeopardised and the Tribunal confirmed decisions of summary dismissal for serious misconduct: see Judgments 63 (*in re* Andreski), 159 (*in re* Bhandari) and 969 (*in re* Navarro). Insulting a colleague in the privacy of his office and then offering apologies that evening and the next morning, which were accepted in writing, does not constitute serious misconduct. Her actions did not jeopardise the material or moral interests of the Organization.

16. The complainant raises the question of irregularity in the appeal process which also tainted the decision.

17. Her detailed appeal filed on 20 November 1997 did not reach the Director of Legal Affairs until 10 December, contrary to paragraph 11 of the Statutes of the Appeals Board which requires it to be forwarded immediately. The reply of the Organization was dated 31 December 1997 and was not sent to the complainant until 5 March 1998, contrary to paragraph 12 which stipulates immediate forwarding to the applicant. The composition of the Appeals Board did not respect the principle of equitable geographical distribution because a member of the Board from Africa was replaced by another from Europe, a Russian. During the proceedings neither the complainant's nor the Director-General's representative was able to present his case owing to continuous interruptions. The Board met on 31 March 1998, the report was dated 23 June and received by the complainant on the 29th. Paragraph 17 of the Board's Statutes requires the adoption of a majority vote promptly after the hearing. The chairperson went back to India the next day and contact was thereafter sporadic. The complainant submits that these irregularities vitiated the appeal process.

18. The Organization claims that the complainant, by writing in her letter of 11 August 1997: "Mr Rissom's 'note for the record' dated 19 May 1995, attached to your letter (which I understand replaces a proper charge sheet ...)", showed that she understood full well the charges against her, and that she had, moreover, received the written testimony of Mr Rissom's

secretary several months previously. It claims that the wording of the letter asking her: "to show cause why ... appropriate disciplinary measures should not be taken against [her] on account of her serious misconduct", indicated the Director-General was providing the complainant with an opportunity to present her case. The matter did not have to be referred to the Joint Disciplinary Committee because it was about summary dismissal under Staff Regulation 10.2. The Director-General was entitled to impose a time limit for her reply, failing which he would take a decision, and this did not mean that the case had been prejudged. The Organization submits that the complainant raises irrelevant matters concerning her first appeal in 1995 and that, while she says the letter of 9 September 1997 contains further accusations, she does not state what they are.

19. The proportionality of the disciplinary measure to the offence is within the discretionary authority of the Director-General. The Tribunal may only interfere with it if it was taken without authority, violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if it is tainted with misuse of authority, or if a clearly mistaken conclusion has been drawn from the facts. The Organization says the Director-General took into account the complainant's previous bad behaviour, and an earlier warning from the Assistant Director-General in charge of the Education Sector, when resorting to so serious a measure. While the complainant denied accusing her German colleague of being a Nazi, clearly, by calling out "Heil Hitler Mr Rissom", that was what she was doing. Nazis were by definition German fascists, and the Director-General is under a legal obligation to ensure that no one with a fascist or Nazi past is appointed to work in the Organization. Allegations suggesting such a past must consequently be taken seriously.

20. The Organization quotes from a report on the standards of conduct in the international civil service and says the complainant's behaviour was not consistent with those standards. She cannot exculpate herself by asserting that the incident occurred "in a private place" because her attack on Mr Rissom was inherently reprehensible. In any case there were witnesses to the incident. UNESCO does not have "to prove that the conduct of the staff member has actually brought the Organization into public

discredit": see Judgment 513 (*in re* Karakalos). Citing Judgments 237 (*in re* George) and 475 (*in re* Lakey) UNESCO says her conduct was reckless, irresponsible and improper.

21. The Organization replies to the question of irregularity of procedure in the internal appeals process as though the Administration and not the Organization was the defendant. It says the "Administration" disclaims responsibility for the Appeals Board which operates independently. The chairperson is appointed from outside the secretariat by UNESCO's Executive Board, and the secretary has independent status. The Administration is not to blame for the delay in forwarding the complainant's detailed submissions to the Office of Legal Affairs or the delay in forwarding its reply to her. The complainant has suffered no prejudice as her case was heard ahead of schedule on 31 March 1998. In any case the composition of the Board did respect the principle of geographical distribution as there are five groups and, for example, the Russian Federation is in group 2 and Greece is in group 1. The irregularity in the conduct of the appeal procedure and delay in producing the report was outside the control of the Administration.

22. In the Tribunal's opinion the Organization once again has denied due process. The letter of 4 August 1997 refers to her "serious misconduct" towards Mr Rissom as reflected in his note and corroborated by his secretary. It is not acceptable that a staff member accused of serious misconduct has to abstract from a narrative account the essence of the allegations against him or her. In quoting the complainant's letter of 11 August 1997 as proof that she understood the charges ("which I understand replaces a proper charge sheet ...") the Organization failed to quote the phrase in full which read "which I understand replaces a proper charge sheet which the Organization should have presented to me". That is a far cry from accepting that she understood the charges. The necessity of having precise "charges" is illustrated by the opinion of one of the members of the Appeals Board who refers to the fact that the complainant had been given a warning and was the cause of tension, yet these were not the charges laid against her.

23. The essence of the accusation is that the complainant conducted herself towards Mr Rissom in the incident on 17 May 1995 as described in Mr Rissom's note and that this amounted to serious misconduct warranting summary dismissal under Staff Regulation 10.2. The Director-General cannot impose disciplinary measures other than censure or summary dismissal without referring the case to a Joint Disciplinary Committee. Therefore, whether the alleged conduct amounted to serious misconduct as opposed to unsatisfactory conduct under Staff Regulation 110.1 was very much an issue to be decided. It appears from the letter of 4 August 1997 that, if the facts in Mr Rissom's note were true, the question of serious misconduct was already established in the opinion of the Director-General.

24. The complainant is correct in her submission that the only evidence she had to confront was Mr Rissom's note. The secretary's account was not provided in the second proceedings and it is immaterial that she received a copy with the first proceedings. That is particularly important in view of all the extraneous matters which have been invoked subsequently to justify the Director-General's decision.

25. The Director-General was entitled to put a reasonable time limit on the complainant's reply, after which he would have the right to make a decision in default. But no point arises here as the complainant did not ask for an extension and replied within the time limit.

26. In treating the incident as calling into play his legal obligation to ensure that someone with the political leanings mentioned in Staff Regulation 4.2.1 is not maintained in office, the Director-General is indulging in serious exaggeration. The complainant's outburst was caused by her annoyance at Mr Rissom's withholding publication of a document she had helped prepare, and was not a serious accusation. Reference to Staff Regulation 4.2.1 is therefore quite irrelevant.

27. The letter of 9 September 1997 also states that the disagreement took place in public, yet that is not an element which appears from Mr Rissom's statement. If the Organization considered the public nature of the incident relevant, it should have formed part of the accusation. The complainant contends that the events which took place in Mr Rissom's office

could not be described as being in public. The Organization has directed its arguments towards whether it was a public place. The terms "in public" and "in a public place" are not synonymous. The Organization argues that if it was a private place as asserted by the complainant, she was guilty of trespass, which is a criminal offence in many jurisdictions. That is an example of the exaggerated tenor of the Organization's arguments.

28. The impugned decision of 12 August 1998 maintaining the complainant's summary dismissal refers to the reasons already set out in the letter of 9 September 1997 and in the Administration's detailed reply to the complainant's appeal of 31 December 1997. That reply, which is summarised in the report of the Appeals Board, refers to previous incidents involving the complainant and said it was not the first time she had behaved in such a manner: she had already been given a warning. However since her past behaviour was not mentioned in the letter of 4 August 1997, it cannot be considered as partly justifying her dismissal. That is a serious error and the Organization compounds it by giving an account in the reply to the present complaint of its perception of the complainant's behaviour since 1991, which did not lead to disciplinary action.

29. The question of proportionality arises where the sanction is out of proportion to the subjective and objective nature of the offence. Staff Regulations 10.1 and 10.2 read:

> "10.1 The Director-General shall establish administrative machinery with staff participation to advise him in disciplinary cases.
>
> 10.2 The Director-General may impose disciplinary measures on staff members whose conduct is unsatisfactory. Notwithstanding the provisions of Regulation 10.1, the Director-General may summarily dismiss a member of the staff for serious misconduct."

30. According to Regulation 10.2 only serious misconduct can give rise to summary dismissal. In the Tribunal's view while the complainant's conduct was not such as to be expected from an international civil servant, nevertheless it was not so serious as to warrant summary dismissal. Her words were intemperate, spoken in the heat of the moment to a superior. That is unacceptable. There was an insulting gesture used twice which was particularly hurtful to Mr Rissom, a German. Again, that is unacceptable.

But on the other hand an apology was offered the same evening and again the next morning and a written acceptance was generously given by Mr Rissom. In the opinion of the Tribunal qualifying the incident as serious misconduct justifying summary dismissal would be a clearly mistaken conclusion to draw from the facts. Therefore, the disciplinary measure imposed was so disproportionate as to amount to a mistake of law.

31. It is not acceptable that the Organization, in defending this complaint, disclaims all responsibility for any alleged shortcomings of the Appeals Board. The Director-General is obliged under Regulation 11.1 to "maintain an Appeals Board to advise him". Time limits are laid down for filing and forwarding pleadings, and these can be extended by the chairperson with the agreement of the Director-General. If the machinery is not working smoothly a staff member's right to have an appeal dealt with in accordance with the Staff Regulations and Rules is affected.

32. The complainant makes serious accusations about the conduct of the appeal procedure. These could only be dealt with by inviting a response from the Board. Rather than delay matters by postponing this judgment to enable that to happen, the Tribunal has decided, in the complainant's interests, to give her immediate satisfaction on the following grounds: she was denied due process and there was lack of proportionality in considering the incident as serious misconduct. It makes no ruling in respect of the alleged inequities relating to the Appeals Board.

33. The complainant is entitled to have the impugned decision set aside, and consequentially the Organization shall:

(i) reinstate her in her former post or another post corresponding to her grade, experience and qualifications, with retroactive effect to the date of separation from service;

(ii) pay her the salary, allowances and other benefits to which she would have been entitled between the date of her separation and her reinstatement;

(iii) take all necessary steps to restore the complainant's pension rights which would have accrued during this period.

In calculating the amount due, account shall be taken of the net occupational earnings of the complainant since her second summary dismissal.

34. The Tribunal further awards her the sum of 10,000 United States dollars in damages for the moral injury she has sustained and 4,000 dollars in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Organization shall provide the relief set out in 33 above.
3. The Organization shall pay her 10,000 United States dollars in damages for moral injury.
4. It shall pay her 4,000 dollars in costs.
5. All her other claims are dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SEVENTH SESSION

***In re* Créchet (Nos. 3 & 4)** **Judgment 1879**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third and fourth complaints filed by Mr Patrick Georges Michel Créchet against the European Patent Organisation (EPO) on 2 July 1998 and corrected on 3 August, the EPO's reply of 6 November 1998, the complainant's rejoinders of 16 January 1999 and the Organisation's surrejoinders of 26 March 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written evidence and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The career of the complainant with the European Patent Office, secretariat of the EPO, is set out in Judgments 890, of 30 June 1988, and 1667, of 10 July 1997, which deal with his two previous complaints.

The complainant started work as a liaison officer between the European Patent Office and the Portuguese National Industrial Property Institute (INPI) in Lisbon on 1 May 1992.

The complainant's letter of appointment provided for two types of allowances: a daily subsistence allowance paid in entirety for the first two months of his mission and a special allowance paid on a monthly basis, to reimburse 80 per cent of his rent paid in Portugal should he choose to retain his lodgings in the Netherlands.

On 5 January 1995 the complainant wrote a letter to the Principal Director of Patent Information in which he complained, for the first time, of not being able to use his car where he was working: his insurance company in the Netherlands refused to insure it for more than sixty days after his departure from that country and Portuguese law only enabled him to insure it for a maximum of six months. On 18 April the head of Administration in Vienna replied that the complainant did not require a vehicle in the course of his duties and that insuring his car was a private matter. On 20 April, the complainant informed the Principal Director that he was unable to solve his problems alone. In various electronic mail communications sent between 27 April and 22 June, he was informed that the EPO was taking steps to try to find a solution with the Portuguese authorities.

In a letter of 31 August 1995 to the Principal Director, the complainant stated that his daily subsistence allowance was insufficient. The amounts he received did not cover certain expenses in Lisbon, such as car rental. In letters of 5 October, the Principal Director informed him that his mission would end on 31 December 1995, and stated that he had received all the daily subsistence allowance and special allowance payments he was owed: requests for further compensation to cover expenses were therefore unfounded.

On 20 December 1995, in appeal No. 146/95, the complainant appealed to the President of the Office requesting reimbursement of his car rental. On 28 February 1997, in a second appeal, No. 30/97, he appealed to a senior officer in the Patent Information department requesting payment of the daily subsistence allowance for the duration of his mission. The matter went before the Appeals Committee, which recommended to the President on 19 February 1998 that he reject the appeal as devoid of merit. In a letter of 25 March 1998, the complainant was informed that the President had decided to endorse this opinion.

On 2 July 1998, the complainant filed two complaints: one, his third complaint, was against the dismissal of his internal complaint No. 30/97; the other, his fourth complaint, was against the dismissal of internal appeal No. 146/95.

B. In his third complaint the complainant maintains that the Appeals Committee did not allow him to organise his defence properly and that he was not heard by the Committee.

He alleges that the texts covering the terms of his mission were not respected. A document of 18 August 1989, regarding policy on information on patents, stipulates that liaison officers are assigned to national offices, full time, and funded by the EPO, in conditions provided for under Article 7 of the European Patent Convention, the Protocol on Privileges and Immunities of the European Patent Organisation, and the Service Regulations. Even though the EPO paid him a special allowance he was badly treated: apart from his entire rent in the Netherlands, he had to pay 20 per cent of his rent in Portugal. He asserts that he was unfairly treated. Under Article 78 of the Service Regulations, the Organisation should have continued to pay him a daily subsistence allowance, even at a reduced rate, beyond the first two months of his mission to compensate him for his loss. He claims to have had the expenses of an official on mission without benefiting from the corresponding allowances.

He asks the Tribunal to set aside the decision of 25 March 1998 of the President, to order the Organisation to pay him the daily subsistence allowance provided for in Article 78 of the Regulations, after deduction of the amounts already paid, and to award him 1,000 German marks in costs.

In his fourth complaint, the complainant cites Article 20 of the Protocol, which reads: "The Organisation shall co-operate at all times with the competent authorities of the Contracting States in order to facilitate the proper administration of justice to ensure the observance of police regulations ...". He points out that he was unable to insure his vehicle and that the Organisation provided him with no support while, in his view, it was obliged to do so. On the contrary, it suggested he make false statements to the Portuguese authorities and terminated his mission to sanction him for the steps he had taken.

He maintains that had the Organisation respected the relevant texts, his position with the Portuguese authorities would have been correct and he could have solved his insurance problems alone. He is shocked by the defendant's inaction, since normal practice for companies with employees abroad involves completely settling all residence problems. The

Organisation had, however, simply suggested that he take out travel insurance, although this type of insurance does not apply to lengthy residence of a professional nature. He asks the Tribunal to set aside the decision of the President communicated on 25 March 1998, to order the Organisation to pay him 1,500 German marks per month of mission for loss of use of his vehicle and for moral damages, and to award him 1,000 marks in costs.

C. In its reply the Organisation first of all applies for joinder of the complainant's third and fourth complaints on the grounds that they are based on the same issues of fact and have the same objectives.

Regarding the third complaint, the defendant asserts that the complainant was not heard before the Appeals Committee because he "refused" to provide enlightenment on his appeals.

It questions the complainant's view that he was working under mission conditions without receiving the related allowances. Its obligations in respect of the letter of appointment had been fulfilled: the daily subsistence allowance had been paid in full for the first two months, followed by a special allowance for the rest of the mission. Since the complainant had accepted these conditions, he could not claim to have been badly or unfairly treated. The Appeals Committee had decided that "maintenance of a (reduced) daily subsistence allowance, in accordance with the provisions of Article 78(3) of the Regulations, was not justified". The defendant states that the complainant had no right to expect the Organisation to finance his two rents in full, since it was his own choice to retain his accommodation in the Netherlands. It adds that throughout his stay in Lisbon his pay had been calculated according to the scales applicable in The Hague, which enabled him to make a profit of 1,500 Dutch guilders per month compared with scales applicable in Portugal.

Payment of an allowance for additional expenses was not possible, since the conditions for such a payment were not met.

Regarding the fourth complaint, the defendant contests having given the complainant no support: although his problems were a private matter – since he had no need of a car in carrying out his functions – it had contacted the INPI requesting it to take steps with the Portuguese authorities to conclude a complementary agreement as provided for under Article 25 of the Protocol.

The complainant was not being sanctioned by the termination of his mission: the Administrative Council's policy of information on patents established a maximum length of three years for such missions and moreover, in its letter of appointment, the Administration had retained the possibility of terminating the mission at any moment.

It stresses that he accepted the conditions of his assignment as set out in his letter of appointment and that he had had sufficient time to sort out his problems before leaving on mission. The normal practice for companies to which he referred was "irrelevant", since it concerned situations in law and in fact which were not comparable to the present case. It states that it never proposed that the complainant submit false statements and asserts that it suggested the travel insurance solution only for the last months of his mission.

D. In his rejoinders the complainant contests the joining of the two complaints, on the grounds that they concern two different points of law: the third complaint concerns Article 78 of the Regulations and the fourth, his legal situation as a liaison officer in Portugal.

In respect of his third complaint, he maintains that he has suffered financial loss, and that the contents of his letter of appointment had not been negotiated. Basing his argument on Tribunal case law, he pointed out that the special accommodation allowance was in addition to, and not in replacement of the subsistence allowance. Furthermore, he justified his decision to keep his accommodation in The Hague by the fact that the Organisation could terminate his mission at any moment. He also contested the assimilation of the daily subsistence allowance with the allowance for additional expenses: the latter being linked to the activity carried out, while the former are linked to the mission.

He explains that even if the Organisation had paid him too high a salary - which in his view is not proven - this does not make good the non-payment of subsistence allowance, since there was no text which stipulated that additional expenses should be paid from salary.

In respect of his fourth complaint, he asserts that he took no action before leaving because his letter of appointment failed to indicate what steps might be necessary.

He states finally that although the use of his vehicle was not necessary to the fulfilment of his professional activity, his freedom of movement was limited without one.

E. In its surrejoinders the defendant reiterates its request for joining of the two complaints.

It explains that the complainant "amalgamates" the various allowances and expenses and that he has never supplied proof of his unsuccessful efforts with respect to Portuguese insurance companies.

CONSIDERATIONS

1. The complainant, a European Patent Office employee, was appointed as liaison officer with the Portuguese National Industrial Property Institute (INPI) in Lisbon, where he was on mission from 1 May 1992 to 31 December 1995: see Judgment 1667 (*in re* Créchet No. 2).

The aim of creating a post of liaison officer was outlined in a paper, No. CA/47/89, on the policy of information on patents, accepted by the Administrative Council and also in the appeal for applications for the post of liaison officer in Portugal.

The details of the mission were stipulated in a letter of appointment of 5 March 1992, and the complainant accepted the conditions set out therein. This letter fixed the length of the mission and also allowances granted by the EPO. It carried the following clauses:

> "2. *Employment conditions*:
>
> ...
>
> (c) The daily subsistence allowance provided for in Article 78, paragraph 3, shall be paid you in full for the first two months of your mission ...
>
> (d) An allowance equal to the installation allowance as defined by Article 73, will be paid you in full at the end of your mission ...
>
> (e) You will receive a special allowance each month for the duration of your mission if you keep your accommodation in The Hague for your own

> use. This allowance is fixed at 80 per cent of the actual rent paid at the place of employment, as defined by Article 74(6) of the Regulations, and shall not exceed 2,000 German marks per month.
>
> ...
>
> (i) All additional expenses incurred in the course of your duties must be authorised by your supervisor. Reimbursement will be made on submission of receipts."

It should be noted that the letter of appointment did not provide for the use of a vehicle by the complainant in the fulfilment of his duties.

2. On 5 January 1995, the complainant wrote as follows to his supervisor:

> "I have been without my car since the beginning of my mission three years ago, as its use is made impossible on the one hand because of a six-month time limit imposed by the Portuguese authorities, and on the other hand because the [Dutch] insurance company only provides sixty days cover abroad."

He asked whether there might be a "special administrative solution" available to international civil servants on mission, or if not, whether it would be possible to extend the accommodation allowance to cover the cost of long-term rental, or find some other solution.

Lengthy correspondence followed. The EPO asserted that it was a private matter; the staff member was responsible for registering his vehicle in Portugal and getting insurance to cover his civil liability. There was no question of the EPO paying an additional allowance. The President of the Office subsequently approached the Portuguese authorities to obtain better future protection for his staff members in this connection.

The complainant took the EPO to task for failing to support him as it was obliged to do.

On 20 December 1995, he asked the President for an award of damages corresponding to the rent paid for a car, 1,500 German marks a month for forty months, giving a total of 60,000 marks.

3. On 28 February 1997, he asked to be paid, for his entire period of residence in Portugal, a daily subsistence allowance under Article 78 of the Staff Regulations, less sums already paid. He justified his claim on the

grounds that "[his] situation in Portugal had not been settled as initially established".

4. The President decided he could not concede to these claims, and transmitted them to the Appeals Committee.

The Committee joined the two appeals, and on 19 February 1998 unanimously recommended dismissing them.

By a letter of 25 March 1998, the complainant was informed that the President had decided to disallow the appeals, in line with the opinion of the Appeals Committee.

In two separate complaints to the Tribunal the complainant requested each decision to be set aside.

The Organisation asks for joinder of the two complaints and for the Tribunal to disallow them. The complainant contests such joinder.

On the joinder

5. The two complaints concern the situation of the same staff member and are based on the same facts, resulting from the legal consequences of the complainant's mission to Lisbon, and a violation, in the complainant's view, of the contract relevant to that mission, although in one case the complainant claims damages, and in the other he claims the implementation of a statutory obligation, for failure to apply the terms of a contract. Since the two cases are related it is reasonable to maintain the joinder decided by the Appeals Committee.

On the claim for damages

6. The complainant criticises the EPO in particular for not having concluded a complementary agreement with Portugal under the terms of Article 25 of the Protocol on the Privileges and Immunities. In his view the Organisation was thus in breach of its duty to protect and assist one of its staff members.

However, the agreement on the complainant's mission neither provided for his needing the use of a car, nor that the EPO should cover the cost of a private vehicle for him. That being the case, in the absence of a complementary agreement with the receiving country, the EPO staff member residing in that country could choose to register a vehicle himself in that country, in accordance with its legislation; he was not, therefore, deprived of the use of a vehicle for his own purposes, and his plea that the EPO did not give him sufficient assistance in solving a possible insurance problem must fail.

True, he did not have the advantages which certain international civil servants enjoy; that he should regret this is understandable. But the EPO could not be considered at fault, since his work did not require use of a personal vehicle, and no such advantage had been granted him. Besides, the post of liaison officer to Portugal was a very recent creation and, once alerted to the problem, the President contacted the Portuguese authorities with a view to coming to a possible complementary agreement under the terms of Article 25 of the Protocol on Privileges and Immunities.

In the absence of a breach of contract governing the relations between the parties by the EPO, the claim for damages fails.

On the claim for daily subsistence allowance

7. Article 78(3) of the Service Regulations provides that:

> "In the case of a mission lasting more than two months, special provisions may be adopted by the President of the Office either at the commencement of or during the mission with the regard to the rate of daily subsistence allowance to be paid from the commencement of the third month."

The complainant puts forward various arguments to prove violation of this provision.

(a) He maintains that the letter of appointment was in breach of Article 78(3).

Payment of daily subsistence allowance during the first two months under Article 78 of the Service Regulations was stipulated in the letter. Point 2(e) of the letter of appointment provided for an allowance equal to 80 per cent of the complainant's rent in Lisbon, should he decide to retain his accommodation in The Hague, as was the case.

The gist of the complainant's argument is that that clause is not in conformity with Article 78(3), since the allowance it mentions is different in nature from the allowance termed "daily subsistence allowance" in Article 78(3), and that it does not determine the "rate of daily subsistence allowance". That argument cannot be sustained. Regarding the terminology employed, it is quite understandable that the expression "daily" subsistence allowance should not be used when speaking of a long-term mission and long-term allowances; as to the nature of the allowance, its purpose was also to contribute to the additional costs to be covered by the staff member in fulfilment of his mission. Given these conditions, the President did not exceed his discretionary authority in considering this allowance to be in accordance with Article 78 of the Regulations.

(b) The complainant also claims that the letter of appointment violates Article 78(3) of the Regulations, since the EPO allowance did not cover the whole of his additional expenses, especially additional accommodation expenses, which were only covered to 80 per cent. This violated the basic principle of Article 78 of the Regulations, as well as the right to equal treatment of staff members. The daily subsistence allowance should thus have been paid for the duration of his mission to Portugal.

The EPO challenges this argument. It holds that the provision left the President a wide degree of discretion, and he took into consideration the fact that living costs are lower in Lisbon than in The Hague, which enabled the complainant to make considerable savings. Moreover, the conditions set out in the letter of appointment were accepted by the complainant.

The complainant supports his argument by referring to Judgment 363 (*in re* Ghaffar No. 2). That Judgment cannot be cited as a relevant precedent since the provisions applicable and the facts therein were quite different from the present case.

The conformity of the letter of application with the Service Regulations can only be judged by returning to the moment at which the parties agreed on the terms of the mission.

Article 78(3) of the Regulations allows the President a wide measure of discretion in the fixing of the daily subsistence allowance - or its equivalent - for the period following the first two months of the mission, in particular regarding assessment of expenses and advantages arising from the mission. Firm precedent has it that the Tribunal will not substitute its opinion for that of the executive chief of an organisation, unless exceptional circumstances so warrant, which is not the case here.

(c) The complainant also asserts violation of Article 78 of the Regulations, on the basis of expenses he had and the inadequate level of compensation which became evident during the mission.

However, the complainant produces no new, unforeseen circumstances which would have required revision of the contract (*clausula rebus sic stantibus*). The level of compensation as compared with the cost of accommodation already figured in the contract. A car was not indispensable, and the cost of a possible vehicle registration fee in Portugal was foreseeable. The post of liaison officer in Portugal was a new creation, and certain logistic problems still to be solved could be anticipated.

It should be noted that although the mission involved new expenses, the complainant's letter of appointment would have enabled him to arrange their prior approval. The complainant has not appealed to the Tribunal on the ground that a request in this respect had been refused.

This being the case, if the contract governing the mission was not in breach of Article 78(3), then neither was the way it was applied.

(d) The complainant's plea of unequal treatment fails, since he provides no evidence in this connection. As in Lisbon his conditions of remuneration were established by agreement, his situation may not be compared with that of staff members governed exclusively by the Regulations or by other agreements; he cites no definite cases comparable to his own in fact and in law.

The claim for daily subsistance allowance fails.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SEVENTH SESSION

***In re* Lainas** **Judgment 1880**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Vassilios Lainas against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 27 January 1998 and corrected on 10 March, Eurocontrol's reply of 19 June, the complainant's rejoinder of 25 August and the Agency's surrejoinder of 18 December 1998, the complainant's further submissions of 23 February 1999 and the Agency's observations of 4 April 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Greek citizen who was born in 1948, is principal assistant at grade B1 serving at the Agency's Central Flow Management Unit (CFMU) in Brussels.

On 16 October 1996, the complainant submitted a request to the Sickness Fund of Eurocontrol for his daughter to benefit, in accordance with Article 72(1) of the Staff Regulations, from reimbursement at 100 per cent for serious illness. By a letter dated 11 November 1996, the Fund accepted this request for the period 12 September 1996 to 11 September 1997, which was subsequently extended until 11 September 1998 by a decision of 15 September 1997.

At the beginning of 1997, as the state of health of the complainant's daughter had deteriorated, her doctor recommended treatment in the United States. On 5 February, the complainant submitted a request to the Fund for the direct payment of medical costs and informed it that he was leaving immediately for the United States to accompany his daughter, who was scheduled to be operated upon there. The direct payment of costs was granted that same day for a duration of twenty days. On 12 February, the Fund paid a deposit of 90,000 United States dollars to the American hospital in which the complainant's daughter was being treated. On the same day, it reminded the complainant of the rules governing the reimbursement of medical expenses established under Rule of Application No. 10 concerning sickness and accident insurance cover. The reimbursement of the medical costs for which no ceiling had been fixed was based on the cost of equivalent care in Belgium, which according to the Fund, generally corresponded to about 30 per cent of the costs charged in the United States, with 70 per cent remaining at the charge of the staff member. On 7 March, the complainant requested an extension of time regarding the direct payment of costs. His request was refused on the grounds that the deposit paid to the hospital had not yet been used up.

By a memorandum dated 4 April 1997, the head of Personnel Management informed the complainant that, on the advice of the medical adviser of the Sickness Insurance Scheme, it had been decided that an exceptional reimbursement would be made at 100 per cent for all the medical costs for treatment before the intervention and for the surgical intervention itself, with the exception of the costs of the hospital stay, which would be limited at 20,000 Belgian francs a day. However, he informed him that, since the medical adviser considered that post-operative treatment could be provided in Europe, the limits set out in Rule No. 10 would be applied to all costs subsequent to the operation. As agreed during a meeting held on 7 April, the complainant indicated by electronic mail on 9 April that his daughter's operation would occur around the middle of May and that she would remain hospitalised until the end of May. On 10 April, the Sickness Fund informed the American hospital that the direct payment of costs had been extended until 31 May 1997.

On 16 April 1997, the Director of Human Resources issued an information note to staff indicating that the Sickness Fund would no longer authorise the direct payment of hospital costs in non-member States of Eurocontrol, including the United States. The complainant's daughter was operated upon on 14 May. On 11 June, the Fund refused a further request for the direct payment of hospital costs submitted by the complainant on 29 May and informed the American hospital.

On 2 July 1997, the complainant initiated a "complaint" against the decision of 4 April. In an internal memorandum dated 22 August, the Sickness Fund Management Committee welcomed the strict application of the limits set out in Rule No. 10, but strongly recommended that the Director General assist the complainant under the terms of Article 76 of the Staff Regulations, which envisages the possibility of making gifts, loans or advances to officials who are "in a particularly difficult position as a result of serious or protracted illness or by reason of family circumstances". By a letter of 29 October 1997, which is the impugned decision, the Director of Human Resources rejected the "complaint" on behalf of the Director General.

B. The complainant contends, first, that the application of 100 per cent reimbursement for serious illness, in accordance with Article 72(1) of the Staff Regulations, precludes the application of ceilings to the reimbursement. He refers to an obvious error of appraisal. He says that the Sickness Fund applied global ceilings to the reimbursement of his daughter's medical costs by referring arbitrarily to the presumed cost of similar medical care in Belgium, whereas such care is not to be found in that country.

Secondly, he alleges a breach of Articles 8 and 9 of Rule of Application No. 10 respecting "special reimbursements" and the "free choice of practitioner and hospital or clinic", as well as of the principles of non-discrimination and proportionality. He says that the Fund refused to apply an "equality coefficient" to take into account the difference in the cost of medical care between the United States and Belgium, on grounds which included the fact that the United States is not a member of the Organisation.

Finally, the complainant maintains that the information note to the staff dated 16 April 1997 is in breach of his acquired rights and of the principles of non-discrimination and non-retroactivity. Furthermore, since these are in his view new provisions, the Organisation should have acted in conformity with Article 100 of the Staff Regulations regarding the general provisions for giving effect to the Staff Regulations.

He seeks the quashing of the impugned decision and costs.

C. In its reply, Eurocontrol maintains that the complaint is only receivable in so far as it contests the limit of 20,000 Belgian francs applied to the costs of the hospital stay, because in other respects the decision of 4 April 1997 was favourable to the complainant who had not yet requested reimbursement of post-operative costs. It adds that the information note to the staff does not constitute an individual decision which can be challenged.

Citing Judgment 1094 (*in re* Gérard and others) the Organisation states that the application of the 100 per cent reimbursement rate is not without limits and, in particular, it does not allow the reimbursement of expenses considered excessive by the medical adviser. The financial situation of the Fund has to be taken into account.

It observes that the application of Article 8 of Rule of Application No. 10 would have been less favourable to the complainant than the exceptional reimbursement from which he benefited, and it explains that equality coefficients were only calculated for member States of Eurocontrol as the sickness insurance scheme was "supposed to replace the national schemes in these countries". It does not deny the right of the complainant to the free choice of medical practitioner, but maintains that the complainant's daughter could have been treated in Europe and that the rules governing reimbursement apply irrespective of the place of treatment.

Subsidiarily, Eurocontrol notes that the direct payment of hospital costs is not a right, but a facility offered to insured persons. A service ruling was not therefore necessary to change this practice. Moreover, since the complainant benefited from this facility until 31 May 1997, he cannot invoke the retroactivity of the note of 16 April. It asks the Tribunal to order the complainant to bear the full costs of the complaint.

D. In his rejoinder, the complainant contends that his choice of the American hospital was not a "mere whim", because this hospital was the only one providing the most advanced treatment methods, including an experimental treatment, and it had the level of specialisation required to save his daughter's life after the many medical errors committed in Belgium. He invites the Tribunal to order a medical enquiry to satisfy itself as to the gravity of the mistakes.

He maintains that the decision of 4 April 1997 was prejudicial to him because it established rigid terms for reimbursement in the future. Moreover, Article 92(2) of the Staff Regulations and Article VII(2) of the Statute of the Tribunal allow a general measure, such as the information note of 16 April, to be challenged. His complaint is therefore receivable.

On the merits, the complainant affirms that the estimate made by the Agency of the cost of similar care in Europe is unrealistic. The cost of a room in a Brussels hospital specialising in cancer would amount to 34,000 Belgian francs a day, exclusive of medical costs. He says that the Fund should have assessed such costs taking into account the exceptional nature of the treatment received by his daughter, rather than evaluating them in an automatic manner. He accuses the Organisation, by interrupting the direct payment of the bills, of trying "to strangle him financially" and of attempting to "oblige him ... to repatriate his daughter to Europe", thereby placing her life in danger. Finally, he contends that a commitment to assist him made by the Director General on 22 August 1997 to the Sickness Fund Management Committee to allocate 9 million Belgian francs under Article 76 of the Staff Regulations was not respected, as he was finally proposed a loan of 4.5 million francs with interest.

The complainant enlarges on his claims. He requests that the Tribunal note the discriminatory nature of the decision to interrupt the direct payment of the bills, and order the defendant to reimburse without any restriction the total medical costs incurred in the United States for his daughter.

E. In its surrejoinder, the Agency requests that the Tribunal determine the receivability of the complainant's new claims. It contends that the complainant's daughter could have been treated in Europe, but affirms that this is not relevant to the case. It observes that the cost of similar care is determined with reference to the fees published by the National Sickness and Invalidity Insurance Institute, a Belgian institution, and that the reimbursements received by the complainant were "very generous". The hospital fees mentioned by the complainant are the rates that apply to someone not covered by a mutual insurance policy. Under an agreement between the Agency and the Brussels hospital in question, its staff and their dependants are given the same treatment as persons that are covered by a mutual insurance policy. Finally, it refutes the allegation that the Director General made a commitment to the Sickness Fund Management Committee: he never attends it. It adds that the Committee went beyond its terms of reference when it recommended recourse to Article 76 of the Staff Regulations, as that Article does not concern the health insurance cover.

F. In further submissions the complainant denies that Eurocontrol staff are treated in the same way as persons with mutual insurance coverage and maintains that they pay higher hospital fees than the latter.

G. In its comments on the complainant's further submissions the Agency maintains that its staff members do get the same treatment as persons with mutual insurance in the Brussels hospital in question owing to the financial Agreement, of which it produces a copy. The complainant seems to be confusing the notion of accommodation and board with the notion of medical costs. In 1997 the cost of accommodation and board alone was between 11,000 and 15,000 Belgian francs in the hospital cited by the complainant, which is well below the disputed 20,000 francs threshold.

CONSIDERATIONS

1. Vassilios Lainas, a Greek citizen, holds a B1 post at Eurocontrol's headquarters in Brussels.

Pursuant to Article 72 of its Staff Regulations the Agency insures its employees and their dependants against sickness. This sickness and accident insurance is governed by Rule of Application No. 10 Concerning Sickness and Accident Insurance Cover (hereinafter Rule No. 10). Although Eurocontrol has set up a Sickness Fund, disputes concerning benefits provided by the Fund are dealt with through the usual procedures.

In 1996 the complainant's daughter was treated in Belgium for a cyst. It was initially diagnosed as fairly benign but was later proved to be a malignancy requiring specific treatment. The specialist who made that diagnosis spoke of an extremely rapid evolution.

On the advice of his daughter's general practitioner, the complainant decided to get her treated in New York at the Memorial Sloan-Kettering Cancer Center (hereinafter, the American hospital), which admitted her on 5 February 1997. The medical care consisted of specific treatment followed by a delicate operation and further treatment. The Sickness Fund accepted the case, but there was a dispute as to the extent of the complainant's insurance coverage. This point will be dealt with below in so far as is necessary. The Fund agreed to reimbursement at the rate of 100 per cent within the meaning of Article 72 of the Staff Regulations. For the period ending 31 May 1997 it covered all medical costs except for the stay in hospital, on which there was a ceiling of 20,000 Belgian francs a day any amount above that being considered "excessive" as compared to Belgian rates - and a sum of 1,303.85 Belgian francs for telephone, television and drinks, which was not refundable.

On 4 April 1997 the head of Personnel Management sent the complainant an internal memorandum about his daughter's medical bills. It said that out of the total amount of the claims he had submitted, 1,293,317 Belgian francs were admitted, but that in accordance with Rule No. 10 the cost of the stay in hospital was calculated on the basis of the rates applied in Belgium; that is, up to a maximum of 20,000 Belgian francs per day, and that the costs of television, telephone and drinks were not refundable. A total of 434,634 francs remained at the complainant's charge. At the end of this memorandum, the head of Personnel Management drew the complainant's attention to the fact that after his daughter's operation he would no longer benefit from the exceptional rate of reimbursement and the normal rates would be applied.

On 16 April 1997 the Director of Human Resources issued an information note to staff about payment of hospitalisation costs by the Sickness Insurance Scheme.

On 6 November 1997 the same Director wrote to the American hospital to remind them that the Agency's guarantee of payment of hospitalisation costs had ended on 31 May 1997 and that any bills after that date were to be sent directly to the complainant.

2. The complainant lodged an internal appeal against the decision of 4 April 1997, against the communication from the medical adviser and "more generally, against any other previous or subsequent, preliminary or related act relied on in support of the offending decisions".

On 29 October 1997 the Director of Human Resources informed him of the Director General's rejection of his appeal and the reasons for it.

In his complaint to the Tribunal the complainant challenges not only the decision of 4 April 1997 but also the communication from the medical adviser, the information note to staff issued by the Director of Human Resources and the communication to the American hospital. On the merits, he submits that to place a ceiling on expenditure is against the rule giving entitlement to 100 per cent reimbursement.

Eurocontrol asks the Tribunal to dismiss the complaint. It submits that only the decision of 4 April 1997 is a challengeable one. On the merits, it cites the case law (see Judgment 1094 *in re* Gérard and others), according to which 100 per cent coverage does not preclude the setting of maximum limits to avoid payment by the Agency of "excessive expenses".

Receivability

3. The medical costs were incurred by a person who has attained the age of majority and is the daughter of an official. The material rules apply by virtue of the official's contract of employment. Except in the case of a deceased official, the Tribunal is open only to the official himself (Article II(6) of the Tribunal's Statute). It follows that the official is also entitled to request application of the provisions of the Statute to his dependants, even if they have reached the age of majority.

4. In his complaint to the Tribunal, the complainant seeks the quashing of four acts of the Organisation, which he takes to be decisions by Eurocontrol: (1) the Agency's decision of 4 April 1997 - which was presented as such and concerns the admissibility of bills submitted to the Sickness Fund; (2) the letter of 4 April 1997 in which the medical adviser

gave his personal opinion as to the Fund's obligations; (3) the information note to staff issued by the Director of Human Resources on 16 April 1997 concerning payment of hospitalisation costs by the Sickness Insurance Scheme; and (4) the communication of 6 November 1997 from the same Director to the American hospital reminding them that the Fund's undertaking to pay costs directly had ended on 31 May 1997. In essence, he objects to the reductions under "excessive expenses" and the end of direct payments by the Fund to the American hospital.

The Agency submits that the complaint is receivable in so far as it challenges the decision of 4 April 1997; for the rest, it is irreceivable for lack of any individual decision.

In his rejoinder the complainant drops his claim to direct payments, having found an arrangement with the American hospital for the payment of the bills. He nonetheless seeks a ruling in law that the Agency had an obligation to continue direct payments. He also seeks the quashing of the Director General's decision refusing "the effective refund of all medical costs incurred in the United States for [his daughter]" and asks the Tribunal to state that "all the above-mentioned medical costs must, without any restriction or reduction whatsoever" be refunded to him.

The conclusion is that his claim for payment by the Agency to the American hospital has become devoid of substance. His new claim to a ruling in law on this point is irreceivable for want of an adequate cause of action; if the matter arises again it may be settled in the context of some specific claim (see for example, Judgment 1666 *in re* Bedrikow under 4(a)).

The same holds good for his claim to a ruling in law concerning the Agency's future obligations as to the extent of its refunds. Such issues may be dealt with as each specific decision on reimbursement arises. Some of the issues may be examined in the context of the decision of 4 April 1997.

The statement at the end of the memorandum of 4 April 1997, concerning the Fund's future intentions, is not presented in the form of a binding decision. It appears as a statement of intent, and so is not a challengeable decision (on the notion of decision see Judgment 1694 *in re* Benaïssa under 7, and the case law cited).

Furthermore, as the Agency rightly observes, the medical adviser's letter had none of the characteristics of a specific decision adversely affecting the complainant. No more does the information note to the staff.

The complaint is therefore receivable only in so far as it challenges the reductions referred to in the decision of 4 April 1997.

5. An amount of 1,303.85 Belgian francs was not refunded since it was for the costs of telephone, television and drinks, which are not covered by the insurance. The complainant neither objected to nor made any claim to reimbursement of that amount under Article 72, so there is no dispute on that score.

So the only issue remaining is the reduction that the Agency made from the costs of the hospital stay on the grounds that any amount over 20,000 Belgian francs a day would be treated as "excessive expenses" and therefore would not be refundable.

The merits

The material rules

6. Sickness insurance and the refund of costs in particular are dealt with in the following provisions of Eurocontrol's Staff Regulations and Rules.

The Regulations provide that:

"Article 72

1. An official, his spouse, where such spouse is not eligible for benefits of the same nature and of the same level by virtue of any other legal provision or regulations, his children and other dependants, are insured against sickness up to 80% of the expenditure incurred, pursuant to the provisions of a rule of the Director General. This rate shall be increased to 85% for the following services: consultations and visits, surgical operations, hospitalization, pharmaceutical

> products, radiology, analyses, laboratory tests and prostheses on medical prescription with the exception of dental prostheses. It shall be increased to 100% in cases of tuberculosis, poliomyelitis, cancer, mental illness and other illnesses recognised by the appointing authority as of comparable seriousness, and for early detection screening and in cases of confinement. However, reimbursement at 100% shall not apply in the case of occupational disease or accident having given rise to the application of Article 73.
>
> One-third of the contribution required to meet such insurance cover shall be charged to the official but so that the amount charged to him shall not exceed 2% of his basic salary.
>
> ...
>
> 3. Where the total expenditure not reimbursed for any period of twelve months exceeds half the official's basic monthly salary or pension special reimbursement shall be allowed by the Director General, account being taken of the family circumstances of the person concerned, in manner provided in the rules referred to in paragraph 1.
>
> ...
>
> Article 76
>
> Gifts, loans or advances may be made to officials, former officials or where an official has died, to those entitled under him who are in a particularly difficult position as a result of serious or protracted illness or by reason of family circumstances."

Under Article 72, the Director General issued Rule No. 10, the current version of which reads:

> "Article 1
>
> Object
>
> In pursuance of Article 72 of the Staff Regulations ... a Sickness Insurance Scheme is hereby set up within the Agency. Within the limits and under the conditions provided for in this Rule and the Annexes thereto, the Scheme will guarantee to persons covered by it the reimbursement of expenses incurred as a result of illness ...
>
> ...
>
> Article 8
>
> Special reimbursements
>
> 1. Special reimbursements may be granted when the expenses incurred are for treatment of a member or of a person covered by his insurance in a country where the cost of medical treatment is particularly high and the portion of expenses not reimbursed by the Scheme places a heavy financial burden on the member. The

application of this paragraph will be the subject of a decision by the Director General taken on the basis of a report of the Central Office and having regard to the advice of the Committee of Management.

2. When the non-reimbursed portion of the expenses covered by the scales annexed to this Rule which are incurred by a member in respect of himself and in respect of persons covered by his insurance exceeds during any twelve-month period half the average basic monthly salary ... the special reimbursement provided for in Article 72.3 of the Staff Regulations shall be determined as follows:
   - the non-reimbursed portion of the above expenses which is in excess of half the average basic monthly salary ... shall be reimbursed at the following rates:
     - 90% in the case of a member by whose insurance no other person is covered;
     - 100% in other cases.

...

4. Where the member so requests, the weighting for his place of employment ... shall be applied to the basic monthly salary ...
5. Decisions on requests for special reimbursement shall be taken by:
   - either the appointing authority, on the basis of an opinion delivered by the office responsible for settling claims in accordance with general criteria adopted by the Management Committee after consulting the Medical Council for determining whether the expenses incurred are excessive;
   - or the office responsible for settling claims, on the basis of the same criteria, where it has been empowered by the appointing authority to do so.

Article 9

Free choice of practitioner and hospital or clinic

1. Persons covered by this Scheme shall be free to choose their practitioners and hospitals or clinics.
2. The Agency shall, wherever possible, endeavour to negotiate with the representatives of the medical profession and/or the competent authorities, associations and establishments, agreements specifying the rates for both medical treatment and hospitalisation applicable to persons covered by this Scheme, account being taken of local conditions and, where appropriate, the scales already in force.

...

> Article 27
>
> Financial balance
>
> The cost of benefits provided under this Scheme must be balanced by contributions from the Agency and from members over a three-year period."

Annex I to Rule No. 10 contains the "rules governing the reimbursement of medical expenses". They set a maximum limit expressed in Belgian francs, for the main items of medical expenditure, and rules on the method of calculating the various rates of reimbursement. The following provisions are relevant:

> "III. HOSPITALISATION
>
> 1. The costs of a stay in hospital shall, in the case of a surgical operation or medical treatment, be reimbursed at the rate of 85%, subject to a maximum limit of BEF 4,127 and BEF 3,851 per day, respectively.
>
>   The costs of a stay shall comprise the costs of board and service, plus taxes.
>
> 2. The surgical operation expenses, as specified in Section II, the expenses incurred for the use of the operating theatre, plaster room, dressings and other expenses in respect of any general care pertaining to the surgical operation, medical fees for visits and calls, laboratory analyses and tests, X-rays, medicines and other diagnostic or therapeutic services shall be reimbursed separately, in accordance with the provisions for the reimbursement of each of these categories of expenditure. If at a hospital centre the all-in charge for a day in hospital comprises the cost of the stay as defined in the second subparagraph of paragraph 1 and all or part of the expenses listed above, reimbursement shall be at the rate of 85%.
>
> ...
>
> IV. SPECIAL CASES
>
> 1. In cases of tuberculosis, poliomyelitis, cancer, mental illness and other illnesses recognised by the appointing authority as of comparable seriousness, expenses shall be reimbursed at the rate of 100%.
>
>   However, reimbursements in any one of such cases under Section VI.1, second paragraph, Section XI.Ia), Section XII.E and F, Annex III.A and B.2 and 3, and Annex IV.B.2) may not exceed an amount equal to twice the maximum amount provided for therein.

> Reimbursements under Section III.3, Section VI.3, Section VIII, first and fourth paragraphs, Section X, Section XI.1b), Section XII.B and Annex III.B.1 may not exceed the maximum amounts provided for in the Rule.
>
> Applications for the recognition referred to in the first paragraph shall be made to the office responsible for settling claims; they shall be accompanied by a report from the practitioner treating the person concerned.
>
> The appointing authority or the office responsible for settling claims, if the requisite powers have been delegated to it by the said authority, shall take its decision after consulting the Medical Adviser, whose opinion shall be based on general criteria drawn up by the Medical Council.
>
> Reimbursement at the rate of 100% shall not apply in cases of occupational disease or accident resulting in the application of Article 73 of the Staff Regulations.
>
> ...
>
> XV. COMMON PROVISIONS GOVERNING REIMBURSEMENT
>
> 1. The following provisions shall apply to reimbursement of the medical expenses referred to in Sections I to XIII.
> 2. Expenses in respect of items not mentioned in the Annexes to this Rule may be reimbursed at the rate of 80% after consultation of the Medical Adviser attached to the office responsible for settling claims. Maximum limits may, however, be set in each case after the Management Committee has been consulted.
> 3. Expenses in respect of treatment considered non-functional or unnecesary by the office responsible for settling claims after consultation of the Medical Adviser shall not be reimbursed.
>
>   That part of expenses considered excessive by the office responsible for settling claims after consultation of the medical officer shall not be reimbursed."
>
> ...

As noted below, the daily rates for hospitalisation were nonetheless increased after the Annex was originally adopted.

Under Article 31 of Rule No. 10 the Director General also issued provisions for the interpretation of this Rule, the following of which are relevant:

"ARTICLE 8 of Rule No. 10

...

1) Paragraph 1

In the interests of equal treatment, equality coefficients have been introduced for the reimbursement of expenditure incurred in currencies other than Belgian and Luxembourg francs. The list of these coefficients, which are set periodically by the Director General, is circulated to members on a regular basis in an Office Notice.

Article 8 of Rule No. 10 does not rule out special decisions in individual cases not covered by the equality coefficients.

In such cases,

- expenses will be reimbursed up to double the maximum amounts specified in the Annexes to this Rule, where appropriate, on a proposal from the Central Office and subject to approval by the Management Committee;
- the condition of 'a heavy financial burden' is deemed to be met when the portion of expenses not reimbursed amounts to 60% of the expenses incurred;
- 'expenses incurred' are assessed item by item.

2) Paragraph 2

...

b) This paragraph applies subject to the rules for the interpretation of Article 8.1 and Section XV of Annex I.

...

ANNEX I - SECTION XV

Second subparagraph of paragraph 3

1. Expenses exceeding by 50% (fifty percent) the cost corresponding to 100% (one hundred percent) of the maximum rates laid down in Annex I to this Rule are to be considered excessive and will not be reimbursed under Article 8.2 of this Rule, subject to the second subparagraph of Section IV.1 of Annex I.
2. For treatment billed in currencies to which an equality coefficient applies, the 50% rate obtains after application of the coefficient."

The Agency also compiled a list of equality coefficients for medical care outside Belgium in other States that are parties to the Eurocontrol Convention. It makes no mention of any equality coefficient for any other State.

The pleas

7. The complainant has the following pleas:

(1) The decision of 4 April 1997 is in breach of Article 72 of the Staff Regulations and its rules of application, since under that article, the rate of reimbursement in the case of cancer is 100 per cent. The Agency itself concedes that paragraph 2 of Section XV of Annex I to Rule No. 10, which allows "maximum limits" for some items, does not apply to hospitalisation costs; it does not even mention them. However, the Agency relied on paragraph 3 of Section XV of that Annex which does allow it to refuse reimbursement of the "part of expenses considered excessive by the office responsible for settling claims after consultation of the medical officer ...". The Sickness Fund appears to treat as "excessive" all the medical expenses incurred by the complainant's daughter in the United States, which exceed the presumed cost of the same treatment in Belgium. That is arbitrary and amounts to applying Section XV(2), although the Agency has declared this provision inapplicable. To determine whether the costs were "excessive", there has to be an itemised assessment. But there was no such assessment and besides, the patient's condition required treatment in the United States, so the costs were not "excessive".

(2) Secondly, he pleads breach of Article 8(1) and (2) of Rule No. 10 and Section XV of Annex I of the rules of interpretation of Rule No. 10: the Sickness Fund refused to apply equality coefficients which take account of the difference in medical costs between the United States and Belgium, and it overlooked the fact that the treatment that his daughter received in New York does not exist in Belgium. The Fund also disregarded the rules of interpretation of Rule No. 10 by failing to count the "tolerance" of 50 per cent, whereby "costs are excessive only over and above the initial maximum of 150 per cent; in view of the rules of interpretation of Article 8, paragraph 1, of Rule No. 10, the amount to be reimbursed is equivalent to double the 150 per cent (i.e. 300 per cent of the original maximum, after application of an equality coefficient)". The Fund should also grant him benefit from Article 8(2) of Rule No. 10 which, according to the complainant,

applies "as soon as the amount of the non-reimbursed expenses exceeds, over a twelve-month period, one half of the basic monthly salary".

The Agency rebuts his pleas. Its arguments will be examined below, as necessary, in connection with each of the complainant's pleas.

Maximum limits

8. Citing Article 72 of the Staff Regulations the complainant submits that, since the Fund accepted his case, he is entitled to 100 per cent cover of the costs incurred. He does not explicitly contend that this article bans any reduction of the rate, but rather that the conditions for such reduction were not met in his case.

According to precedent, which the Tribunal sees no reason to modify (see Judgments 1094 *in re* Gérard and others, and 1095 *in re* Gilles), coverage at the rate of 100 per cent does not mean that in all circumstances an insured person is entitled to full repayment of expenses incurred. Article 72 provides for insurance only up to a percentage of the expenditure incurred and pursuant to the provisions of a rule of the Director General. To allow the Fund not to reimburse the part of the expenses deemed to be excessive is in keeping with the purpose of sickness insurance and it is a means of ensuring sound financing and comparable coverage for the beneficiaries, and as such falls within the authority delegated to the Director General. The reimbursement of expenses can be restricted by setting maximum limits or ceilings for certain types of expenditure or by reckoning limits for each case on the basis of costs incurred. Based on that delegation of authority, the provisions of the rule of the Director-General are consistent with the ranking of rules as regards allowing the restriction of the Fund's benefits to be restricted as necessary.

The alleged promise of reimbursement at the rate of 100 per cent

9. The complainant cites a statement issued by the Fund on 11 November 1996 promising to refund all medical costs in full, a decision which was extended on 15 September 1997 until 11 September 1998.

It is clear from the documents he cites that they do not have the meaning he seems to attribute to them. Both the complainant's request to the Fund and the latter's decision refer to coverage at the rate of 100 per cent within the meaning of Article 72 of the Staff Regulations and its Rules of Application. So the complainant must have been aware that what the Fund had undertaken was reimbursement at the rate of 100 per cent under this article, which did not imply a promise to pay his expenditure in the United States regardless of its amount.

Nor did the Fund's promises of direct payments to the American hospital imply that it would pay his costs in full for as long as they continued and without limits.

Indeed, in its internal memorandum of 12 February 1997 the Fund explained to him exactly how it envisaged reimbursement for the medical care provided in the United States.

The plea is therefore without merit.

The equality coefficient

10. Citing the rule of interpretation of Article 8(1) of Rule No. 10, the complainant submits that the Agency should work out and apply to him equality coefficents for medical care in the United States. But equality coefficients have been set only for States that are parties to the Eurocontrol Convention. For non-member States the Fund may apply the equality coefficient 100, which is the base coefficient applied to medical care in Belgium and Luxembourg.

The Agency explains that it had to introduce equality coefficients to offset differences between member States because Article 24 of the

Convention as amended provides for Eurocontrol to substitute its own sickness insurance scheme for those of its member States. The Article states that: "By reason of its own social security scheme, the Organisation, the Director General and staff of the Organisation shall be exempt from all compulsory contributions to national social security bodies". Since the persons insured under Eurocontrol's scheme were thus entitled to its benefits, to the extent that it replaces national social security schemes – the Agency was bound to set coefficients for equality as between the member States. That is not so for non-member States. When medical treatment is provided in such a State and its cost is particularly high, the Fund may grant special reimbursements under Article 8(1) of Rule No. 10.

The complainant argues that the social protection provided under Article 72 of the Staff Regulations requires that, being free to choose their practitioners (Article 9 of Rule No. 10), staff members and persons covered by their insurance must be able also to obtain equivalent benefits from the Fund regardless of the country in which they are treated. Accordingly, for a country such as the United States where medical costs are particularly high, that means setting an equality coefficient enabling someone treated there to obtain actual cover equal to the cover he would get in one of the member States. By failing to set an equality coefficient or provide some similar arrangement the Agency committed a breach of the principles inherent in Article 72, which warrants the quashing of the impugned decision.

He rightly observes that, as a result of the high cost of medical care in the United States combined with the lack of an equality coefficient and the fact that the Fund's participation is determined on the basis of costs in Belgium, the Fund's share of the costs actually incurred in the United States turned out to be relatively small, the complainant being left to pay the remainder.

Judgment 1094 cited above showed that the purpose of Article 72 is to provide staff with a workable sickness insurance scheme. The article lays down some basic features of the scheme, and one of them is the rates of refund that apply to different kinds of treatment, and sickness insurance must be provided pursuant to the provisions of a rule of the Director

General. The latter is thereby empowered to do whatever is needed to make the scheme workable and financially sound, provided that he abides by the provisions of the Staff Regulations. The cost of the scheme is shared between Organisation and staff in line with the principle of solidarity. That is why it is a proper precaution to set maximum limits on the costs of some forms of treatment and to require prior permission in some cases.

The same holds good for medical treatment in a country which is not a member of Eurocontrol. The free choice of practitioner and hospital is not at issue. But sound management of the Fund's finances, as is described above, would not adjust easily to a situation where a member may burden the Fund with additional costs - for the same treatment - simply by choosing to be treated in a non-member State. That would be the case if, for such a country, the Fund had to set an equality coefficient taking account of medical costs which are higher in that country than in Belgium. Besides, the beneficiary is not denied the social protection intended by Article 72 if he has the choice of treatment in a member State. He also has a duty to spare the Fund any unnecessary costs. In these circumstances, it is quite reasonable that the Fund should allow him to choose where he wants to be treated, while letting him bear any additional costs incurred by treatment in another country. This does not apply, however, if he has no alternative but to seek treatment abroad.

In the interests of fairness, in Article 8(1) of Rule No. 10 the Director General established a flexible rule whereby special reimbursements may be granted for treatment in a country where medical costs are particularly high and the portion of expenses not reimbursed places a heavy financial burden on the member. Proper application of this rule enables cases where some kind of weighting is necessary to be taken into account.

It is true that the "interpretation of Rule No. 10" of Article 8(1) which provides for the introduction of equality coefficients, does not expressly differentiate between treatment in member States and treatment elsewhere. The Agency's interpretation of it appears reasonable, however. As it explains, it has to provide the citizens of its member States with benefits equivalent to the ones they would receive under national social security schemes, which at all events is the case as regards treatment in the State of which the complainant is a citizen. But it has no equivalent obligation in respect of other States and their nationals. Article 8(1) of Rule No. 10 presupposes that there are countries for which there is no equality coefficient, and affords a proper basis in law for the Agency's differentiation.

Nor has Eurocontrol committed any breach of equal treatment, since the same rule applies to everyone covered by the Fund. Such differentiation as the Agency does apply is warranted, being based on the consideration that all members of the Fund have a duty to help to keep costs down as far as is reasonable.

That being so, the rule in question and the absence of an equality coefficient for the United States are lawful and show no abuse of the Director General's discretion.

Even if a member had no alternative but to seek treatment outside the member States, in a country where medical costs are very high, it would not be deemed contrary to Article 72 for the Fund to ask for a relatively modest contribution in the form of "excessive expenses".

And that was the case here: for the period taken into account in the impugned decision, the Fund in the end paid 92 per cent of the costs, which left only 8 per cent to be borne by the complainant (as excessive costs for hospitalisation).

So there is no need to determine whether the complainant's daughter's condition required treatment in the United States, as the complainant contends and the Fund denies. To seek a medical opinion on the matter, as the complainant suggests, would therefore serve no purpose.

"Excessive expenses"

11. The complainant contests the reduction of the reimbursement of his hospital bill, which was considered to include "excessive expenses" within the meaning of Section XV, second subparagraph of paragraph 3 of Annex I to Rule No. 10.

(a) The complainant holds first that Section XV.3 of Annex I should not be applied in his case since the Agency wishes to introduce "maximum limits", and it is Section XV.2 which provides for this possibility.

Conversely, the Fund considers that paragraph 2 is not applicable to the case in point, since the complainant's daughter received treatment listed in the annexes, and this excludes the application of paragraph 2. There should be no confusion between the "maximum limits" in the meaning of paragraph 2, and the applicable "thresholds" (which are not "maximum limits"), and which are covered only under paragraph 3.

As the complainant does not contest that the treatment administered is provided for in the annexes to Rule No. 10, from that point of view there is nothing to prevent application of Section XV.3 of Annex I.

(b) *Inter alia*, the complainant asserts that, were a reduction assumed to be generally acceptable, a maximum of 20,000 Belgian francs a day for hospitalisation expenses would be manifestly inadequate, in view of their cost in Belgium and the States members of Eurocontrol; the fixing of an insufficient maximum limit would affect the notion of "excessive expenses", and require correction by the Tribunal.

The Agency contests this. It submits that the ceiling on the costs of accommodation and board reimbursed at 85 per cent, as set forth in Section III of Annex I to Rule No. 10 was 4,127 francs a day in the case of a surgical operation and, in the case of medical treatment, 3,851 francs a day. In 1994 the Sickness Fund Management Committee decided, as a result of increases in hospital charges, to replace the ceilings by maximum reimbursable limits of 8,500 francs in cases of reimbursement at 85 per cent, and 10,000 francs in cases of reimbursement at 100 per cent; a rule of interpretation was provided for Section III.1, second subparagraph and Section III.2 and Annex I to Rule No. 10. Finally, in a minute of 22 July 1997, the amount of 10,000 francs was replaced by 20,000 francs with effect from 1 June 1996; beyond this amount, the medical adviser's opinion is required to determine whether the expenses are to be considered excessive. In the present case, after consultation with the medical adviser, it was considered unnecessary to exceed a participation of 20,000 francs a day, since the amount billed by the American hospital for costs of hospital stay only included board, service and taxes, and was exclusive of medical costs.

These facts are not contested. The complainant submits that for an equivalent stay at the Jules Bordet Institute in Brussels, the current cost is 34,000 francs per day (plus 1,500 francs for a second bed), exclusive of medical treatment.

The Agency explains that the costs quoted by the complainant are applicable to patients who are not covered by a mutual insurance company or by the sickness insurance scheme of an international organisation; Eurocontrol had concluded an agreement with this hospital – as with others – that it was in no case possible for a hospital stay to be charged at more than 20,000 francs a day.

In a further submission, the complainant contested that Eurocontrol staff members were charged at the same rate in this hospital as persons subscribing to a mutual insurance scheme. In reply Eurocontrol produced evidence showing that staff members benefited from arrangements valid for European Union staff members, the same tariffs as those with mutual insurance. It also points out that in 1997 it cost between 11,000 and 15,000 francs per day for those with mutual insurance to stay in a private room in the Jules Bordet Institute.

Thus, the cost of hospitalisation in Belgium for a Eurocontrol staff member in an establishment similar to the American hospital would not exceed 20,000 francs a day.

(c) The complainant deplores that the challenged decision does not base its estimation of the expenses as "excessive" on the particular case of his daughter, but on an over simple rule applicable to everyone, while failing to take into consideration the real level of expenses he had to bear, or the need for those expenses if his daughter's life was to be saved.

The objection appears groundless.

The fixing of the level of expenses in Belgium and in the member States provides a valid, objective figure for all patients receiving treatment outside these States.

Eurocontrol rules also make it possible to examine the necessity for expenses incurred in the present case where the expenses are not considered excessive and to adjust the level of the Fund's participation.

This is what the Fund has done here. For the first period of stay in the United States (the only part at issue) it approved all medical expenses as such, no doubt assuming that the complainant had serious reasons for admitting his daughter to an American hospital; however, on analysis of the bills submitted for hospitalisation, the Fund considered that certain treatment was not subject to reimbursement at 100 per cent. After consultation with the medical adviser, it deemed that participation beyond the maximum limit of 20,000 francs per day was not justified.

(d) If, by this argument, the complainant maintains that he has a right to reimbursement of the entire cost incurred in treating his daughter in the American hospital, he will run aground against the considerations of the Tribunal in the precedents cited above, regarding the limit of the treatment expenses reimbursed by the Eurocontrol Sickness Fund. These limitations were established with the financing of the scheme in mind, which is shared between the Agency and staff members and based on a certain equality in the cover provided by the Fund.

Given these conditions, part of the expenses arising from accommodation and board could be borne by the insured person, even if treatment in the United States might be preferable for the complainant's daughter.

Non-provision of "special reimbursement"

12. The complainant seems to believe that provision of a special reimbursement under Article 8.1 of Rule No. 10 would enable him to cover the entire expenses.

The Agency replies that the medical costs in their entirety were paid for the period that was covered by the decision of 4 April 1997, and that this was a special measure which meant that the complainant had obtained overall reimbursement at 92 per cent. If, the Agency states, "a special decision was approved pursuant to Article 8.1 and its Rules of Interpretation, the result would in any event be less favourable to the complainant (reimbursement at around 67 per cent only)"; here, the Agency is clearly considering a situation where the medical treatment would be refunded in line with the amount due in Belgium for equivalent treatment, the sums still due being seen as amounts going above the maximum limits, or even as "excessive expenses" dealt with by a special reimbursement under Article 8.1.

The considerable financial advantage given by the payment of the medical costs in their entirety for this period represents a special reimbursement within the meaning of Article 8.1 of Rule No. 10, and the amount allocated is in no way an abuse of the discretionary authority of the Fund, and therefore of the Agency.

It should nonetheless be noted that according to the Fund, the complainant could not benefit from a special reimbursement since the reduction had been made under the heading of "excessive expenses" and, pursuant to Annex I, Article XV.3, second paragraph, of Rule No. 10, "part of expenses considered excessive by the office responsible for settling claims after consultation of the medical officer shall not be reimbursed". For the reasons stated above, no judgment is required on this point.

13. The complainant also claims the right to a special reimbursement under Article 72(3) of the Regulations and Article 8.2 of Rule No. 10 (expenses not reimbursed within a period of twelve months exceeding half the average basic monthly salary).

The Agency counters this claim by citing Annex I, Article XV.3, second paragraph of Rule No. 10 "common provisions governing reimbursement", which reads "[t]hat part of expenses considered excessive by the office responsible for settling claims after consultation of the medical officer shall not be reimbursed". It explains that in the absence of such a rule, there would be no limit on reimbursement of excessive expenses. This view was already contained in the impugned decision. Therefore, it may be considered that all the elements of this point have been dealt with.

However, the request for reimbursement based on Article 8.2 of Rule No. 10 appears premature. It presupposes an average salary of the staff member calculated over a twelve-month period, as well as a portion of non-reimbursed expenses incurred "during any twelve month period". Clearly the period during which the expenses were incurred is the one to be taken into consideration. Here, however, the incident that revealed the illness of the complainant's daughter occurred in September 1996. A biopsy was carried out on 13 September 1996 and a first operation took place on 24 September 1996, approved by Eurocontrol's Sickness Fund on 11 November 1996. The complainant's daughter was hospitalised in the United States and the challenged decision of 4 April 1997 concerns expenses incurred for the period from 5 February to 3 March 1997. At that time, the treatment was in progress and was being charged. Since the twelve-month period had not ended, the Fund was unable to establish the possible amount of the special reimbursement under Article 72(3) of the Regulations and Article 8.2 of Rule No. 10.

It is only at the end of this period that the Fund will be able, if needs be, to fix the reimbursement of uncovered expenses which could, under these provisions, give rise to a special reimbursement; it shall examine the application of Annex I, Sections IV and XV, as well as the interpretation to Article 8 of Rule No. 10 and to Annex I, Sections IV and XV; it shall ensure that the interpretation does not rob the original rule - especially Article 72(3) - of its meaning.

14. In brief, the complaint must fail. However, the Tribunal notes that the Fund was premature in considering whether or not to provide a special reimbursement under Article 72(3) of the Regulations and Article 8.2 of Rule No.10.

The Agency asks that the complainant pay costs regarding this complaint. Since his pleas fail, he must pay his own costs. The Tribunal rules that he shall not pay the Agency's costs.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

***In re* Goode** **Judgment 1881**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Jeffrey Harold Goode against the International Labour Organization (ILO) on 30 July 1998, the ILO's reply of 29 September, the complainant's rejoinder of 3 November 1998 and the Organization's surrejoinder of 15 January 1999, the complainant's further submissions of 29 January and the ILO's comments thereon dated 4 May 1999;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United States who was born in 1954, entered the service of the International Labour Office, the Secretariat of the ILO, on 15 December 1996 in the ILO branch office in Washington. As from 13 January 1997 he was stationed at ILO headquarters in Geneva as a senior research officer (labour economist) at grade P.4 in the Conditions of Work and Welfare Facilities Branch. The first two years of his appointment, which was initially for one year, were a period of probation pursuant to Article 5.1 of the Staff Regulations. The complainant was responsible for a research project on the relationship between working time and employment which was scheduled for publication in the summer of 1998.

On 5 September 1997, the complainant's first-level supervisor, the chief of the Branch, completed his first performance appraisal report, covering the period 15 December 1996 to 31 August 1997. She considered that his performance was not satisfactory in terms of quantity and quality and criticised the complainant for not showing "the initiative and research skills expected". The complainant signed the report on 10 September and attached his comments. He refuted the allegations of his first-level supervisor and accused her of managing the Branch in an authoritarian manner and of being hostile towards him. The complainant's second-level supervisor, the Director of the Working Conditions and Environment Department, initialled the report on 19 September and approved the appraisal made of the complainant's performance. On the same day, he forwarded it to the Reports Board.

At the request of the Reports Board, on 8 October 1997 the Director of the Department made the following recommendation: "Based on his performance during the period under review, it is clear that Mr Goode is not suitable for the effective implementation of the work of the Branch". The complainant was also heard by the Board which, in comments dated 12 November 1997, concluded that the quality and quantity of the work provided by the complainant were not sufficient to recommend the renewal of his contract. By a minute dated 11 December 1997, the chief of the Personnel Planning and Career Development Branch informed the complainant that the Director-General had decided to endorse the recommendation of the Reports Board. However, to enable the complainant and his family to make the necessary arrangements, he had accepted his request for an extension of his contract up to 31 July 1998.

On 9 February 1998, the complainant filed a "complaint" under Article 13.2 of the Staff Regulations against the decision not to renew his contract. He described several flaws invalidating the procedure for the appraisal of his performance, and particularly that the period covered by the appraisal was less than nine months. By a letter of 6 March, the Director of the Personnel Department informed the complainant that the Director-General had requested the Board to review the points made in his "complaint" and to confirm or withdraw the opinion that it had issued. At the request of the Board, the complainant's first-level supervisor undertook an appraisal of his performance for the month of September 1997 and of a draft text which was to be the second chapter of the publication on working time. She maintained her previous appraisal. On 23 April 1998, having examined the new report and the complainant's observations thereon, the Board reiterated its comments and recommendation.

The complainant received a copy of this opinion on 28 April and submitted his observations on 11 May. By a letter dated 29 May 1998, which is the impugned decision, the Director of the Personnel Department informed the complainant of the final decision of the Director-General to confirm the decision not to renew his contract.

B. The complainant contends that, according to Articles 5.1 and 5.5 of the Staff Regulations, the period of probation is two years and that the probationary performance appraisal shall be established after eighteen months of service. Under Article 6.7.3 that appraisal is preceded by a first performance appraisal after nine months' service. In his case the decision to end his employment was based on only eight-and-a-half months of service. Moreover, in breach of the case law of the Tribunal, the ILO did not give him an opportunity to improve and terminated his appointment even though his supervisor had assured him when he was recruited that the period of probation was only a formality.

He denounces the bad faith of his first-level supervisor. He says she brought forward the date on which part of his work was due with the sole aim of preventing him from keeping to the deadlines and she deliberately shortened the appraisal period to exclude from his performance report certain tasks with which he had been entrusted and which he had carried out. He adds that his second appraisal, for his performance in September 1997, was tantamount to "retaliation" to punish him for lodging a "complaint".

The complainant submits that the Reports Board issued its recommendations on the basis of an appraisal, issued on 8 October 1997 by the Director of the Department, which was not a recommendation made in due form. He states that the Board committed several procedural errors, particularly in indicating in its comments that the complainant had not started work on the second chapter of the publication. He notes that his supervisors submitted his draft chapter to third persons, without any other information, and complains that their comments were referred to the Reports Board.

He contends that the ILO's attitude has caused him substantial financial prejudice, harmed his and his wife's health and damaged his reputation, particularly with his former employer.

The complainant seeks: (1) the quashing of the impugned decision; (2) the withdrawal of the appraisal report, the comments of the Reports Board and any document relating to the appraisal of his performance in his personnel file; (3) his reinstatement as a probationary employee and the payment of his salary and allowances since 1 August 1998 or, if this is not possible, the payment of two years' salary and allowances; (4) the award of 30,680 United States dollars in compensation for the costs directly incurred by his premature return to the United States; and (5) one year's salary and allowances as damages.

C. In its reply, the Organization contends, as the main issue, that decisions relating to the appraisal of performance, as well as decisions on the renewal of contracts, lie within the discretionary authority of the Director-General and that the Tribunal has only a limited power of review over them.

Moreover, the ILO points to the absence of evidence of the bad faith of the complainant's first-level supervisor and explains that she could not have given any assurance as to the nature of the period of probation. It considers that the appraisal made by the Director of the Department was sufficiently explicit for the Reports Board to issue its opinion. It says that the comments made by third persons on his performance were not part of the appraisal process and demonstrate the objectivity of his supervisors. Finally, although the case law of the Tribunal does indeed provide that the period of probation should give the official an opportunity to improve, it does not oblige an organisation to renew the contract of an official who, after one year's probation, is deemed incapable of carrying out the functions of his post.

The ILO contends that the complainant's fourth plea is not receivable through failure to exhaust the internal remedies and that he has no contractual right to reinstatement.

D. In his rejoinder, the complainant submits that the ILO had the moral and legal obligation to accord him two years to prove himself. In his view, the errors and unfairness of his performance appraisal are sufficiently well documented to allow the Tribunal to invalidate the impugned decision.

Moreover, the Guide to the ILO's Monitoring, Evaluation and Reporting System (MERS) states that work plans should be prepared not later than 31 January each year, whereas his work plan, which was used to appraise his performance from 15 December 1996 to 31 August 1997, was only approved on 3 July 1997.

He denounces the bad faith of the ILO in attaching to its reply minutes which had been withdrawn by common agreement. He produces documents to demonstrate that the poor management of his first-level supervisor had caused many difficulties for members of the Branch and that the Staff Union had been informed.

The complainant contends that only the official concerned and his direct supervisors are authorised to take part in the performance appraisal process. Recourse to third persons, whose comments were taken word for word by the chief of the Branch without even citing them, constitutes a procedural flaw. He adds that his career record gives sufficient grounds for doubting the allegation that he lacked the capacity to effectively implement his work as a senior economist.

E. In its surrejoinder, the ILO refutes the complainant's claim that he had a right to a two-year appointment. It contends that, if there were flaws in the first performance appraisal, they were remedied by the second appraisal. The defendant explains that it produced the minutes which had been withdrawn to demonstrate that the complainant was well aware of what was expected of him.

F. In further submissions, the complainant claims not to have seen a minute written by his first-level supervisor to the Reports Board on 2 March 1998, which was produced by the defendant in its surrejoinder. He states that the minute was defamatory and wrongly alleged that he had submitted his complaint to the Reports Board. In his view, this constitutes a violation of the procedures of the Reports Board and proves that his supervisor endeavoured to manipulate the Board.

He considers that the surrejoinder demonstrates the strong bias of the Organization against him and denigrates him. He calls on it to retract its statements and says that it owes him an apology.

G. In its comments on the complainant's further submissions, the ILO asserts that it produced the above minute to demonstrate that any lack of restraint by the chief of the Conditions of Work and Welfare Facilities Branch occurred, not when she was acting as his supervisor, but as a reaction to defamatory statements made against her in the internal complaints procedures.

The Organization recognises that the complainant had not submitted his "complaint" to the Reports Board, but observes that the Board would have to examine it because it questioned its first conclusions. However, as his supervisor's criticisms had nothing to do with the quality of his work during the period under review, there was no reason to seek the complainant's views on the subject.

CONSIDERATION:

1. The complainant was engaged as a senior research officer with effect from 15 December 1996. From 13 January 1997, he was stationed in Geneva. In accordance with the applicable staff rule, the first two years of his appointment, which was initially for one year, were to be probationary.

2. A probationary employee's first performance appraisal is supposed to take place after nine months. In fact, in the complainant's case, the effective date of his first performance appraisal report was 31 August 1997, just eight-and-a-half-months after his appointment. The report, prepared by the complainant's first-level supervisor, was extremely unfavourable. After being reviewed by the Department Director and by the Reports Board (a committee of senior officials whose function is to advise the Director-General on such matters) the report reached the Director-General who, on 11 December 1997, decided that the complainant's contract, originally due to expire on 14 December 1997, instead of being renewed to allow for the completion of the normal probationary period of two years, should only be extended to 31 July 1998.

3. The complainant filed a "complaint" to the Director-General on 9 February 1998. In that complaint, he attacked the decision not to renew his contract for the usual one year period on a number of grounds relating

both to the process followed and to the substance of the decision. He also alleged abuse of authority and unfairness on the part of the supervisor who had prepared the original unfavourable performance appraisal report. The Tribunal views this part of the internal complaint as including an allegation of personal prejudice against the complainant's supervisor.

4. The internal complaint was divided into two parts. The Director of Personnel told the complainant by a letter of 6 March 1998 that the Director-General was asking the Reports Board to review both its report, and the process leading to the original decision not to extend the complainant's contract beyond 31 July 1998, in the light of further inquiry and evaluation and consideration of other relevant material. Following receipt of the Board's report, the Director-General would decide whether to renew the complainant's contract until the end of the normal probation period of two years or to confirm the expiration date of 31 July 1998.

5. The consideration of that part of the internal complaint which related to abuse of power and unfair treatment by the complainant's supervisor was deferred and would be dealt with according to the letter of 6 March 1998 "at the same time", that is after the report was received from the Reports Board.

6. The Reports Board carried out the investigation requested by the Director-General. It sought and obtained a new performance appraisal report and other information regarding the complainant's work and productivity. It examined and itself evaluated an important and critical part of his work product. It received representations from the complainant and his superiors. After due deliberation it reported to the Director-General that "the additional elements presented to it were not sufficient to make it alter its views" and that it was not in a position to recommend an extension of the complainant's contract. The report of the Board, dated 23 April 1998, was submitted to the complainant for his comments which were submitted, along with the report itself, to the Director-General. The latter, by a decision of 29 May 1998, confirmed the non-renewal of the complainant's appointment. That is the impugned decision.

7. Nothwithstanding the terms of the letter of 6 March 1998, referred to above, the second part of the complainant's complaint to the Director-General does not appear to have been dealt with. Both the complainant and the Organization indicate that it is still under investigation.

8. The complaint to the Tribunal attacks the impugned decision on both procedural and substantive grounds. In particular, it asserts non-compliance by the Organization with certain provisions of the Staff Regulations relating to probationary employment. It also complains of unfair treatment by the complainant's supervisor and attacks the substance, both of the original performance appraisal report and of the revised performance appraisal conducted in March 1998 which formed the basis of the report by the Reports Board.

9. The Organization, for its part, takes the position that the only issue is the decision not to renew the complainant's original one-year contract. It states, correctly, that the complainant did not have a guarantee of two years' employment and the fact that a probationary period is two years does not create such a guarantee. It accordingly frames the issue in terms of its discretionary right to renew or not to renew an employee's contract upon its expiry. On that basis, it takes the position that most of the arguments advanced by the complainant are irrelevant.

10. This is too absolute a position. Even if the decision not to renew the complainant's contract for a further year was purely a matter of discretion, that decision is subject to review by the Tribunal if it is shown that it was procedurally defective or resulted from an abuse of power or from personal prejudice. But these are the very allegations which the complainant has made against his supervisor and on which the Organization says it cannot take a position because it is still in the process of investigating them.

11. The supervisor was the first line author of both the original performance appraisal report of 5 September 1997 and of the revised report of March 1998. If it is shown that she had abused her power or had acted out of personal prejudice towards the complainant, her critical role in the

ultimate decision not to renew his contract is such that the decision itself could be reviewed on that basis.

12. The Organization limits its plea on the question of personal prejudice to the simple assertion that there is no evidence to support the complainant's position. It asserts that the language employed by the supervisor in her various communications about the complainant was generally moderate and professional in tone.

13. The evidence does not bear out this assertion by the Organization. In at least one document, a minute addressed to the Reports Board, dated 2 March 1998, the supervisor engages in very strong language to describe the allegations of the complainant.[*] The issue of personal prejudice is of course likely to turn on far more than whether or not the complainant's supervisor was polite. The point is that the Tribunal is simply not in a position to judge the issue since neither party has pleaded it fully.

14. The Tribunal deplores this situation. It was wrong for the Organization so to deal with the complainant's internal complaint as to divide it into two parts which are in fact logically inseparable. Great cost and inconvenience might have resulted if the Tribunal had found itself obliged to adjourn the matter to its next Session in order to have the parties complete their pleadings.

15. As it turns out however that will not be necessary. As indicated above, the material produced includes a minute of 2 March 1998 addressed by the complainant's supervisor to the Reports Board. That minute contains very unflattering and tendentious language about the complainant. It was only produced by the Organization in the present record in January 1999 at the time it filed its surrejoinder.

16. Immediately after receipt of the surrejoinder the complainant sought leave from the Tribunal to produce a further pleading. Such leave

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[*] The complainant quotes, but does not produce, another document produced by his supervisor after the impugned decision which engaged in similar hyperbole.

was granted and the Organization also was given the right to reply thereto. Those new pleadings have now been received.

17. The complainant asserts and the Organization does not deny that the minute of 2 March 1998 addressed to the Reports Board was not seen by him nor sent to him prior to the production of the Organization's surrejoinder.

18. There is here a clear breach of the rules of natural justice. The minute in question is dated just prior to the Reports Board undertaking a new and complete reassessment of the complainant's performance appraisal. The resulting report of the Reports Board was at the very foundation of the final decision reached by the Director-General which is the decision impugned in these proceedings.

19. It was highly prejudicial towards the complainant and wrong for his supervisor to have been permitted to make *ex parte* representations to the Reports Board, especially at this critical time. It was also improper for the Reports Board not to have communicated the minute in question to the complainant and invited his comments on it.

20. The Organization argues that the supervisor's unflattering comments to the Reports Board concerning the complainant "had nothing to do with the quality of his work during the period being reviewed by the Board". Even if it were true, the submission is beside the point. Prejudicial comments made to a body advising the decision-maker by one of the parties to a dispute are often irrelevant to the actual substance of the dispute. They are nonetheless prejudicial. If such comments are made, an opportunity must be given to the other party to respond to them. By failing to do this the Reports Board breached its duty of fairness.

21. The report of the Reports Board being vitiated, the decision of the Director-General which is based upon such report cannot stand and must be quashed.

22. The complainant is entitled to be paid his salary and benefits for the period from 1 August 1998 to 15 December 1998 the date on which his

term of contract for a normal probationary period would otherwise have expired, less the amount of any occupational earnings during that same period.

23. The complainant is not as yet entitled to any moral damages. If and when the question of personal prejudice has been decided and if that question comes before the Tribunal, then the issue of moral damages may be dealt with at that time.

24. Given this result and the fact that the complainant's remaining pleas could not give him any better result, such pleas will be dismissed.

DECISION

For the above reasons,

1. The impugned decision is quashed.
2. The Organization shall pay the complainant his salary and benefits for the period from 1 August 1998 to 15 December 1998 less the amount of any occupational earnings during that period.
3. All his other claims are dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

***In re* Sharaf (Nos. 1, 2, 3 and 4)** **Judgment 1882**

THE ADMINISTRATIVE TRIBUNAL,

Considering the four complaints filed by Mrs Maha Akram Sharaf against the Food and Agriculture Organization of the United Nations (FAO) on 15 December 1997 and corrected on 5 April 1998, the FAO's reply of 23 July and the complainant's letter of 11 November 1998 informing the Registrar of the Tribunal that she did not wish to enter a rejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is of Egyptian nationality and was born in 1952. She joined the FAO's Regional Office for the Near East, in Cairo, on 1 February 1992 on a one-year contract. She was employed as a telephone operator at grade G.3. The FAO confirmed her appointment at the end of the probationary period and extended it to the end of 1993 and then to 31 December 1995.

By a memorandum of 15 February 1995 the FAO's Regional Representative in Cairo told her that having reviewed her personal file and the "essential qualifications" listed in her job description she was to sit an English language test in June at level "C".

In order to obtain level "C" she sat the proficiency test three times. She took it on 29 June 1995, while unwell, and failed it, her knowledge of English being rated "inadequate". On 8 October she sat it again, but only attained level "B" instead of the higher level "C" required by her job description. The Representative gave her a third and last chance to take the test on 12 November, but she did not pass. The complainant says she was not well on that occasion either, went to hospital later in the day, and sent in a medical certificate bearing that date.

After her unsuccessful first attempt at the test the Regional Representative warned her in a memorandum of 4 September 1995 that failure to attain the required language level might "jeopardize" the extension of her fixed-term contract and could result in her separation on 31 December 1995 on the expiry of her contract. After her second attempt he wrote to her on 9 November, repeated his warning and informed her that her within-grade step increase was being withheld since her performance had not improved and had been "negatively affected" by her poor command of English.

As she failed the third test, a personnel officer from the Personnel Policy and Entitlements Service at headquarters, in Rome, sent her a letter dated 27 November, which she received on 30 November, informing her that her contract, due to expire on 31 December 1995, would not be renewed as she had not reached the level of English required to discharge the duties of her post. That is the decision under challenge. She wrote back to the personnel officer on 10 December protesting against the non-renewal of her contract. His reply of 22 December confirmed that she would be separated on 31 December under Staff Rule 302.907.

On 26 December the complainant asked for sick leave from 27 December to 2 January 1996. The Medical Service gave its agreement and the effective date of separation was deferred to 2 January. An exchange of correspondence ensued relating to non-extension, separation formalities and sick leave.

A medical officer in Rome wrote to her on 15 July 1996 informing her that as she was separated from the Organization it was not possible to take into consideration a medical certificate from her covering the period 29 November 1995 to 16 May 1996, dated 16 May 1996 but received by the

Medical Service on 10 May 1996. In a reply of 2 August 1996 she informed the officer that before the end of her contract she had submitted to the Regional Office in Cairo a medical certificate dated 18 November 1995 and covering a period of six months. She also sent the Chief Medical Officer in Rome a medical certificate dated 16 May for four months and one dated 25 July 1996 for a year.

She received payment of a withdrawal settlement from the United Nations Joint Staff Pension Fund on 12 September 1996, but further correspondence followed in 1997 between the complainant and the Pension Unit at FAO headquarters, as it appeared that the Unit had not received the necessary completed "Pension Fund Payment Instructions" form from her.

On 16 June 1997 the Assistant Director-General in charge of Administration and Finance told her that a letter from her dated 29 May 1997 would be treated as an appeal to the Director-General under Manual section 331. He wrote again to her on 28 July 1997, on the Director-General's behalf, dismissing her appeal as irreceivable and devoid of merit.

The complainant wrote to the secretary of the Appeals Committee on 5 August 1997 and asked how to proceed with an appeal against the refusal of Van Breda, the administrator of the staff health insurance, to reimburse certain dental expenses. In a letter of 27 August the secretary replied that the letter she might challenge, within sixty days of receiving it, was the one of 28 July constituting the Director-General's reply to her appeal. The Assistant Director-General in charge of Administration and Finance wrote to her in similar terms on 15 October 1997. She filed her four complaints with the Tribunal on 15 December 1997.

B. The complainant opposes the non-renewal of her fixed-term contract. She pleads that she was "subjected to injustice" on the part of her supervisors in Cairo, and that as she had stood up to them they wanted her to go. For four years she had been performing the same duties with no complaints about her ability to do her work or any criticism about her ability to communicate in English.

Her first complaint centres on the three English tests that she sat. She maintains that her supervisors treated her unfairly and she cites examples. She was ill for the first exam on 29 June 1995, but the Regional

Representative would not postpone it. Neither would he postpone the third one on 12 November; he gave her only two days' notice and she felt ill on that day too. With regard to the second exam on 8 October, she alleges that the "test record" form sent to her giving her rating as only level "B" was not the original result, and did not include the marks for the "reading" and "questions" parts of the test.

She finds it unfair that of the eleven staff members who had previously failed the exam she was the only one asked to sit it for the third time, and the only one who was separated from the Organization. Moreover, the FAO, she asserts, arranged free English lessons for her colleagues who had not passed the test.

Her second complaint focuses on the medical certificates she provided during her illness. She pleads that the Regional Office did not forward all of them to headquarters in Rome. Certificates dated 12 and 19 November 1995 were not sent on. She therefore forwarded copies of them to the Chief Medical Officer in Rome, which she was able to do, she states, as she was still in the employ of the FAO and had not signed her separation form or pension form.

In her third complaint she objects to further "injustice" from her supervisors with regard to her pension forms. The Representative, she alleges, refused to let her sign her separation and pension forms, because he "wanted" her separation, but did not want her to receive money due to her from the FAO. The separation form was sent to headquarters without her signature: she argues that she was therefore in service until the end of 1996.

Her fourth complaint lists the appeals that she sent to the Director-General and to the Appeals Committee. On 12 December 1995 she sent an appeal to the Director-General against her separation, but received no reply. She sent him more than ten letters between 1995 and 1997.

She affirms that on 29 May 1997 she wrote to the Appeals Committee, with a copy to the Director-General. That letter was an appeal to the Committee, but the Assistant Director-General in charge of Administration and Finance told her by a reply of 16 June 1997 that it had been decided to treat it as an appeal to the Director-General. By his letter of 28 July informing her that the Director-General had dismissed that appeal he told her she could appeal against that decision to the Committee within sixty days. She submits that she sent one dated 10 August 1997 by registered mail, with all her documents, and that it constituted her second appeal to the Committee. Having received no reply she had come to the Tribunal.

She seeks the renewal of her appointment, pay for the years 1996 to 1998 "or more", a monthly pension or, failing that, a suitable post in a United Nations agency in Cairo.

C. The complainant has submitted four complaints to the Tribunal stemming from the same events and in its reply the Organization asks for their joinder.

The Organization argues that the four complaints are irreceivable under Article VII(1) of the Statute of the Tribunal for failure to exhaust the internal means of redress. On 28 July 1997 the Assistant Director-General in charge of Administration and Finance had informed her that her appeal to the Director-General of 29 May was dismissed because it was out of time and devoid of merit. He said that his letter constituted a reply from the Director-General under Manual paragraph 331.311, and under Staff Rule 303.131 she could appeal to the Appeals Committee within sixty days of receiving it. Instead of filing her internal appeal she has come directly to the Tribunal.

The FAO acknowledges that the complainant had written to the Committee on 5 August 1997 to ask it to help her in her "problem with Van Breda". The secretary of the Committee informed her by a letter of 27 August 1997 that it was the letter of 28 July that she might appeal against, within sixty days of receipt, as that letter constituted the Director-General's reply to her appeal.

The Organization assumes that in all four complaints, the complainant is seeking redress for the decision not to renew her contract, communicated to her by the letter of 27 November 1995. It submits that it did not renew her contract as her performance was unsatisfactory: in particular, her knowledge of English was insufficient to allow her to perform the duties of her post and this was evident from her failing the test in English three times.

The FAO observes that in her second complaint she is seeking extension of her contract "to allow her to exhaust her sick leave entitlements". It produces her sick leave record showing that she was on authorised sick leave for various periods up to 2 January 1996. The application for six months' sick leave, dated 18 November, and which the complainant produces as evidence for the Tribunal, does not figure on the list and seems to be "at odds with the applications received by the Medical Service, for shorter periods". It rejects the complainant's allegation that the Regional Office did not forward the medical certificates to headquarters.

In her third complaint she is protesting at the way the FAO handled her separation, terminal emoluments and pension formalities. From the incidents mentioned in her complaint it is not clear what redress she is seeking or which administrative decisions she is seeking to reverse.

The Organization wrote to the complainant several times and told her that her terminal entitlements were being withheld pending an investigation by Van Breda into a claim she made for dental expenses. They have now been paid to her.

She challenges "the handling of her separation, including terminal emoluments and payment of medical bills, and even about not receiving replies to her letters and appeals".

The Organization takes note of the letter dated 10 August 1997 to the Appeals Committee produced by the complainant. It assumes she sent it before she received the letter of 28 July from the Assistant Director-General communicating to her the dismissal of her appeal to the Director-General.

CONSIDERATIONS

1. The complainant joined the FAO's Regional Office for the Near East in Cairo on 1 February 1992 as a telephone operator at grade G.3 on a fixed-term contract for one year. It was later extended to 31 December 1993 and for a further two years to 31 December 1995.

2. By a letter dated 27 November 1995, and received on 30 November, a personnel officer at headquarters wrote to the complainant regarding an English language examination which she had taken on

12 November 1995. He informed her that she had failed to show the language knowledge required for the discharge of her duties and that her fixed-term appointment, which was due to expire on 31 December 1995, could not be extended. She replied on 10 December requesting renewal of her contract and on 12 December she wrote to the Director-General asking him to continue her employment. However on 22 December 1995 the personnel officer confirmed the decision of 27 November.

3. On 26 December 1995 the complainant applied for sick leave from 27 December 1995 to 2 January 1996. It was approved by the Medical Service and the effective date of her separation was postponed to 2 January.

4. On 10 May 1996 the Medical Service received an application for sick leave from 29 November 1995 to 16 May 1996. It was refused. A further application, also dated 16 May, for sick leave from 16 May to 16 September 1996 was also refused.

5. On 24 May 1996 the complainant wrote to the personnel officer claiming to have been sick at the time of her separation. She repeated that claim in a letter to him of 2 August 1996. She also enquired about salary and reimbursement of medical claims by Van Breda, the administrator of the staff health insurance. Over the following months she wrote several letters to headquarters, including one requesting compensation, which was refused.

6. On 29 May 1997 the complainant wrote to the Appeals Committee setting out all her complaints concerning the English examinations, her unfair treatment while sick and her separation. The secretary of the Committee passed the letter to the Assistant Director-General in charge of Administration and Finance who replied on 16 June 1997 saying that her letter of 29 May would be treated as an appeal to the Director-General under Manual section 331.

7. By a letter of 28 July 1997 the Assistant Director-General informed the complainant that her appeal had been dismissed as irreceivable and unfounded. He dealt with her complaints about unfair treatment, the English

examinations, sick leave applications, separation and the medical claims submitted to Van Breda. He added that his letter constituted the Director-General's reply as provided for in Manual paragraph 331.311; if she wished to appeal against that decision to the Appeals Committee she might do so in accordance with Staff Rule 303.131 and Manual section 331 within sixty days of receipt of the letter.

8. The complainant wrote on 5 August 1997 to the Appeals Committee asking for help with her problem with Van Breda. She also wrote to the Committee on 10 August 1997 detailing problems about her separation and pension forms, troubles with Van Breda and about the English language examinations. She asked for help to obtain a payment of 485.90 United States dollars from headquarters in Rome.

9. On 27 August 1997 the secretary of the Appeals Committee acknowledged receipt of her letter of 5 August and told her that the letter of 28 July from the Assistant Director-General constituted the reply to her appeal to the Director-General. If she wished to challenge that decision she could file an appeal with the Appeals Committee within sixty days of receipt. He enclosed the Manual section 331 about the appeals procedure.

10. The complainant lodged four complaints with the Tribunal on 15 December 1997. In her first three complaints she identifies the letter of 27 November 1995, received on 30 November 1995, as the decision impugned.

11. Three of her complaints are as follows: the first, about the three English language examinations she was asked to sit; the second, about unfair treatment when she was sick; and the third, about her treatment in connection with the separation and pension forms. No specific redress is claimed in those three complaints.

12. In her fourth complaint she seeks renewal of her contract, salary from 1 January 1996 until 1998 or beyond, a monthly pension ("salary") or

alternatively recruitment to any suitable post in a United Nations agency in Cairo. In this complaint she merely sets out details of different letters sent at different times without advancing any arguments; she concludes by saying that she sent a second appeal to the Appeals Committee by a letter of 10 August 1997 to which she received no reply and has therefore come to the Tribunal. She identified the first appeal as the letter of 29 May 1997.

13. Since all four complaints are based on the same subject matter, the Organization has asked the Tribunal to join them, which the Tribunal agrees to do.

14. The Organization claims that under Article VII of the Tribunal's Statute, none of the complaints is receivable because the complainant has failed to exhaust the internal means of redress. The FAO claims that a reply to her letter of 10 August 1997 was unnecessary because it was presumably sent to the Appeals Committee before she received the letter of 28 July, and in any case before she received the reply from the Committee's secretary of 27 August 1997 to her letter of 5 August.

15. By waiving her right to file a rejoinder the complainant has chosen not to contest the Organization's argument regarding irreceivability.

16. The Tribunal considers that the complainant was clearly informed in the letter of 27 August 1997 that the letter of 28 July 1997 was the reply to her appeal to the Director-General and that if she wished she could file an appeal within sixty days of receipt of that letter. She was given the necessary information for the presentation of her appeal to the Committee. She was again reminded of this in a letter of 15 October 1997, from the Assistant Director-General. She chose not to follow that route. Despite being a prolific and lengthy letter writer, she did not say in reply to either letter that she considered she had already lodged an appeal with the Appeals Committee by her letter of 10 August 1997. In fact, she did not reply to the letter of 27 August from the secretary of the Committee.

17. In any event, it is the letter of 29 May 1997 that she identifies in her fourth complaint as remaining unanswered by the Organization. Yet this was answered in detail on 28 July 1997.

18. The Tribunal is satisfied that the first three complaints are irreceivable because of failure to exhaust the internal means of redress, and the fourth complaint is dismissed as unfounded.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 7 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Mark Fernando, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

MARK FERNANDO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-SEVENTH SESSION

***In re* Roudakov**
(Interlocutory order)

Judgment 1883

THE ADMINISTRATIVE TRIBUNAL,

Considering the motion for an interlocutory order granting interim relief filed on 12 November 1998 by Mr Vladimir Ivanovitch Roudakov together with a complaint brought the same day against the World Health Organization (WHO), and the WHO's comments on the motion of 17 December 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

Considering that the facts of the case and the arguments on the motion may be summed up as follows:

A. The complainant, a Russian born in 1954, was appointed to WHO as head of the Russian language translation subunit of the Office of Language Services on 1 July 1989 at grade P.5. Immediately before this appointment, he had worked at the Ministry of Health of the former Union of Soviet Socialist Republics (USSR). In agreement with the Russian Federation, his initial two-year appointment was extended for another year, up to 30 June 1992, and then again until 30 June 1993.

On 20 April 1993, pursuant to Judgment 1249 *(in re* Reznikov), the Organization sent a memorandum to the complainant requesting him to indicate formally whether or not he wished to be considered as being on secondment to the WHO. On 17 June 1993, the complainant replied in the affirmative and requested clarification on the meaning of the new secondment rules which would, according to the memorandum, become applicable to him.

On 29 July 1993, the Organization sought the agreement of the Ministry of Health of the Russian Federation for another two-year extension of the complainant's secondment to 30 June 1995. In a telex of 2 August 1993, the Russian Ministry of Health agreed to and confirmed the secondment and said that the complainant had "the right to revert to his previous employment in the Russian Federation and retain[ed] all his rights and entitlements". On 20 December 1995, the complainant's contract was again extended for a further two years until 31 December 1997.

On 7 July 1997, the Organization advised the complainant that the Ministry of Health of the Russian Federation did not wish his secondment to continue after the expiry date of 31 December 1997. The complainant wrote to the Director-General on 22 July 1997 asking him to "cancel" the decision not to extend his contract.

By a letter of 19 September 1997 to the complainant the chief of Contract Administration and Information confirmed on behalf of the Director-General that his secondment to the WHO would end on 31 December 1997. On 18 November 1997 the complainant submitted his notice of intention to appeal against this decision to the headquarters Board of Appeal.

In its report of 27 April 1998 the Board recommended *inter alia* that the decision not to extend the complainant's contract beyond 31 December 1997 be quashed, and that he be reinstated with retroactive effect as from 1 January 1998 on a two-year fixed-term contract on a post of indefinite duration. On reinstatement the complainant was to be given the choice of remaining on secondment under a new formal tripartite agreement, or to sever all ties with his previous employer, the Russian Federation. By a letter of 26 June 1998 the Director-General informed the complainant that he did not accept these recommendations. This is the impugned decision.

B. In his motion for an interlocutory order, the complainant states that he "was wrongfully denied a renewal of his fixed-term contract based on the WHO's false and erroneous belief that he was seconded from the Russian

Federation's Ministry of Health to the WHO". He is appealing against the decision not to renew his contract because he was not on a true secondment but was a regular staff member entitled to all the procedural guarantees and rights of any other WHO staff member. In the interim, he seeks an order for injunctive relief pending final resolution of his complaint against the Director-General's decision.

He pleads that his motion is receivable. He argues that although there is no specific article in the Statute and Rules of the Tribunal governing requests for preliminary injunctions and no specific provisions directly prohibiting injunctive relief, general legal principles should be used as guidelines. He submits that under "common law and international law" there are some remedies allowing preliminary injunctions for the purpose of restraining defending parties from committing further acts of infringement and to preserve the status quo. Such injunctions are discretionary and can be granted only where the complainant stands to suffer irreparable harm.

In his view the general three-part test is that: (i) there would be irreparable harm if no provisional relief was granted; (ii) there must be a reasonable likelihood of success on the merits of the case; and (iii) the "balance of hardships" must tip in favour of the complainant.

The complainant states that he fulfills all the requirements of the three-part test. A forced return to the Russian Federation would result in irreparable social and cultural harm to himself and his family; "real dangers" exist there, given the current social and economic upheaval, and accepting a lower post in the Russian Federation would cause him "psychological insult and embarrassment" and would be detrimental to his career as an international civil servant. Such a return would be "full of anguish and uncertainty".

The complainant expects to succeed on the merits in the complaint currently before the Tribunal because he was successful in his appeal to the Board of Appeal, and his case is factually very similar to that of Judgment 1249.

He stresses the "devastating" consequences of a forced move to the Russian Federation. In comparison, the costs to the WHO of avoiding such irreparable harm are "relatively non-existent".

As injunctive interim relief, he seeks: (i) an order requiring the WHO to place him on special leave without pay as provided under WHO Staff Rules 650 and 655.1 to 655.2.4, pending the Tribunal's final judgment, to allow him and his family to remain lawfully in Switzerland; (ii) an order that the Organization offer him on a priority basis and for the duration of the procedure any Russian language translation work which the WHO might grant to external translators; and (iii) "such other injunctive or interlocutory relief as the Tribunal deems proper, just, and necessary".

C. In its comments the Organization requests the Tribunal to dismiss the motion.

First, the Organization pleads that the motion is irreceivable. No provision of the Statute or Rules attributes competence to the Tribunal to grant the provisional "enforcement" relief sought by the complainant, and the relief he seeks exceeds the remedies that the Tribunal may grant under its Statute.

Any interim decision to reinstate the complainant as a staff member would prejudice the critical issue of whether he was a staff member "on secondment" when his appointment came to an end. If the Tribunal was to order that the complainant become a staff member, as he requests, without the agreement of the Russian Federation, he would in effect be a "staff member not on secondment", thereby prejudging the case.

Second, on the merits, none of the reasons put forward by the complainant justifies the interim relief that he is seeking. In particular, the complainant's argument that a forced return to the Russian Federation would cause irreparable harm to himself and his family does not justify the measure of relief sought by him. No Professional category staff member is assured of "a life-long assignment in Geneva".

With respect to the complainant's arguments that he would suffer irreparable harm and that the "balance of hardships" is in his favour, any interim relief would become without cause if the Tribunal eventually dismissed the complaint. If, on the contrary, the Tribunal determined that the decision not to renew his contract was invalid and awards the appropriate remedy, he would suffer no harm.

The complainant argues that due to the headquarters Board of Appeal's recommendations and the similarities between his case and that of Judgment 1249 there is every likelihood that his claims will succeed on the merits. His argument supports the Organization's view that to grant relief would prejudge the issue before the Tribunal which would fall outside the Tribunal's competence.

CONSIDERATIONS

1. The complainant contests his separation from his employment with the WHO upon the expiry of his contract on 31 December 1997. The principal dispute between the parties is as to whether or not the complainant was on secondment from his government. The headquarters Board of Appeal found in the complainant's favour but the Director-General did not follow its recommendations. The complainant, by a motion for an interlocutory order, seeks preliminary injunctive relief to force the Organization to place him on unpaid leave of absence and to offer him contract work as available. He pleads that otherwise he will suffer irreparable harm.

2. The Organization pleads that the motion is irreceivable and also contests it on the merits.

3. The motion not being granted on the merits there is no need to examine the issue of receivability.

4. First, to allow the motion would of necessity decide the principal issue in the complaint which is before the Tribunal on the merits. The requested injunction would have the effect of altering the *status quo*. The reply raises serious issues which should only be determined on the merits.

5. Second, the allegation of irreparable harm is unconvincing. Such harm, by definition, may not be compensated by financial damages. The Tribunal can and does grant such damages in appropriate cases of wrongful separation and these may include compensation for the mental anxiety that a complainant says he has suffered. However, the fact that the complainant in this case may not be able to continue to live in Switzerland is irrelevant; he is not and does not claim to be a refugee from his country of origin.

6. Finally, the balance of hardships favours the Organization. If the complaint is allowed, the complainant will recover his due; if it is not and he obtained the injunction that he is requesting, there would be no practical way in which the Organization could be made whole.

DECISION

For the above reasons,

The motion is dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

EIGHTY-SEVENTH SESSION

In re Vollering (No. 15) Judgment 1884

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifteenth complaint filed by Mr Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 16 January 1998, the EPO's reply of 2 April, the complainant's rejoinder of 29 April and the Organisation's surrejoinder of 10 June 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch citizen born in 1952, is employed by the European Patent Office, the EPO's secretariat, as a patent examiner at grade A3 in Directorate-General 1 (DG1) at The Hague.

In the spring of 1993, the Administration sent to the complainant his intermediate staff report for the year 1992. His immediate superior had proposed his overall rating as "a weak 'good'" but, on 14 April 1993, the countersigning officer, Mr Phillips, Principal Director, DG1, assigned him the overall rating of "less than good". On 18 September 1993, the complainant completed his part of the staff report asking for the matter to be treated further. A conciliation procedure was instigated.

During this procedure, the complainant learned that the Principal Director had sent the mediator a note, dated 17 December 1993, in which he expressed his concern at the approach adopted by two staff members, one of whom was the complainant, with regard to the conciliation procedure, which they had tended to convert into a negotiation procedure. On 23 December 1993 a reporting expert intervening on the complainant's behalf sent the mediator a letter in which he qualified Mr Phillips' note as unwarranted and considered that it constituted "prejudicial interference" in the conciliation procedure.

Since the complainant and his superior could not reach an agreement, the President of the Office decided on 17 October 1994 to confirm the overall rating proposed by the countersigning officer. On 5 January 1995, the complainant wrote to the President. He requested him to reconsider his decision or otherwise treat his letter as an internal appeal. By a letter of 21 September 1995, the Director of Staff Policy informed the complainant that the President had decided to annul his decision of 17 October 1994 and to change the overall rating from "less than good" to "good".

B. The complainant explains that the decision of 21 September 1995 to award him the assessment "good" did not bring to an end the internal appeal procedure that he had initiated, since his appeal also concerned the prejudice shown by the reporting officers in drawing up his staff report for 1992. He concludes that this part of his appeal is still pending. He states that he is "convinced" that, three years after it was lodged, his appeal will not be treated any more by the Appeals Committee and that he is entitled to appeal directly to the Tribunal.

He contends that the differences in assessment between the 1992 report and his other reports is sufficient to prove the prejudice against him.

He submits that the Principal Director "sabotaged" the conciliation procedure by implicitly instructing his Director not to cooperate any more in finding a solution to the dispute.

The complainant requests the Tribunal:

(1) to condemn the prejudice of the complainant's Director expressed in the complainant's staff report for 1992 and to order compensation to the complainant of 10,000 guilders for the moral damage suffered;

(2) to condemn the prejudice of the complainant's Principal Director expressed in the complainant's staff report for 1992 and to order compensation to the complainant of 20,000 guilders for the moral damage suffered;

(3) to order the EPO to remove Mr Phillips as countersigning officer in and after the staff report for 1992 and/or to pay moral damages of 5,000 guilders for every staff report after the staff report for 1992 in which Mr Phillips acts as countersigning officer;

(4) to condemn the EPO for the prejudice shown and the sabotage done by its officers involved in the appeal procedure about the assessment in the complainant's staff report for 1992 before and during the proceedings of the internal Appeals Committee and to order compensation to the complainant of 50,000 guilders for the moral damage suffered through the EPO's abuse of administrative power and abuse of "good faith" in obstructing the complainant's staff report for 1992;

(5) to condemn the EPO for the "unacceptable" long delay of the reporting and appeals procedure and to order compensation to the complainant of 10,000 guilders for the moral damage suffered;

(6) to order the destruction of the 1992 staff report and of all of its copies which are in the possession of the Administration;

(7) to order the remaking by the complainant's Director of the staff report for 1992 so that it meets the criteria of "neutrality and objectivity";

(8) to award him 10,000 guilders in costs.

C. In its reply, the EPO contests the receivability of the complaint since the matter is out of time. It states that the President's decision of 21 September 1995 constituted an "express final decision" on the one claim made in his appeal, thereby "definitively" ending the internal appeal procedure.

Subsidiarily, the EPO submits that the complaint is unfounded since, in its view, the decision of 21 September 1995 gave full satisfaction to the complainant.

Finally, it observes that the complainant uses the present complaint to restate all his grievances against the EPO. It considers that the "ferocity" with which he attacks the Organisation is certainly designed to damage its reputation and requests the Tribunal to find that the present complaint constitutes an abuse of process.

D. In his rejoinder, the complainant contends that his internal appeal is still pending on the grounds that the President's decision of 21 September 1995 did not explicitly state that it was putting an end to the procedure.

He affirms that no personal offence against staff members was intended, but recalls that the Organisation is obliged to protect its staff members against any prejudice by its officials. He also submits that the EPO is endeavouring to invert the situation by stating that he is prejudiced against some of its staff.

E. In its surrejoinder, the EPO rejects the pleas made by the complainant in his rejoinder.

CONSIDERATION

1. This complaint is manifestly without merit of any sort.

2. The complainant wrote to the President of the Office on 5 January 1995 asking him to reconsider his decision of 17 October 1994 taken on point XI(ii) of the complainant's intermediate staff report for 1992.

In the event that the President did not wish to meet this request he asked that the letter be considered as an internal appeal under Articles 106 to 108 of the Service Regulations.

3. The President by letter of 21 September 1995 informed the complainant that he had decided to annul his decision of 17 October 1994 and change the complainant's overall marking from "less than good" to "good".

4. The complainant claims this decision only dealt with part of his appeal leaving the other part outstanding. He claims he is therefore entitled to come to the Tribunal after a lapse of over three years for lack of an express final decision even though the internal means of redress have not been exhausted.

5. The complaint is irreceivable. The President's decision of 21 September 1995 definitively ended the internal appeal procedure for the entire dispute. The complainant had merely asked the President to reconsider his decision and the President cancelled it and gave the complainant an improved rating.

6. Under the Service Regulations recourse may only be had to the Appeals Committee if the President considers that a favourable reply cannot be given to the internal appeal. The decision of 21 September 1995 therefore put an end to the internal appeal procedure. The complainant did not impugn that decision.

7. The complaint is also without foundation and is an abuse of the Tribunal's process. The President's decision allowed the complainant's appeal and gave effect to his request that his staff report for the year 1992 be reconsidered. He was upgraded from "less than good" to "good". The complainant's argument that he is somehow injured by the fact that the President did not deal with all the points that he would have made in his internal appeal is simply vexatious. As in a previous case brought by this same complainant (see Judgment 1431, *in re* Vollering No. 4, of 6 July 1995) the redress sought has been obtained, leaving no substance underlying his claim.

8. The Tribunal has never heretofore imposed a costs penalty upon a complainant. However, it asserts unequivocally that it possesses the inherent power to do so as part of the necessary power to control its own process. Clearly, such power must be exercised with the greatest care and only in the most exceptional situations since it is essential that the Tribunal should be open and accessible to international civil servants without

the dissuasive and chilling effect of possible adverse awards of costs. That said, however, there is another side to the coin: frivolous, vexatious and repeated complaints to the Tribunal absorb the latter's resources and impede its ability to deal expeditiously and fully with the many meritorious complaints which come before it. They are also, of course, costly and time-wasting for the defendant organisation.

9. In the present case the Organisation has not asked for an award of costs but has simply sought a declaration that the complaint is an abuse of process. The Tribunal makes such a declaration and further declares that in future it will award costs against complainants in appropriate cases if they are sought.

DECISION

For the above reasons,

1. The complaint is dismissed; and
2. The complaint is declared to be an abuse of process.

In witness of this judgment, adopted on 7 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SEVENTH SESSION

***In re* Petter**

Judgment 1885

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Renate Petter against the United Nations Industrial Development Organization (UNIDO) on 30 March 1998, the UNIDO's reply of 3 September, the complainant's rejoinder of 10 November 1998, and the Organization's surrejoinder of 16 February 1999, the complainant's further submissions of 14 April and the Organization's comments thereon of 6 May 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Austrian born in 1943, joined UNIDO (at the time, a subsidiary organ of the General Assembly of the United Nations) in 1973 on a fixed-term appointment as a shorthand typist at grade G.4. Following three years of probationary appointment, UNIDO granted her a permanent appointment in 1976. It assigned her to the Office of the Executive Director in the Special Advisory Group on Energy in 1979, and promoted her to G.5 in 1982. She was reassigned in 1987 as a programme clerk, and promoted in 1990 to senior programme clerk at G.6 – corresponding to G.5 under the present grading system. After a UNIDO reorganisation in 1994, she was assigned to the Industrial Sectors Fund Unit.

Between 1993 and 1996, in response to serious financial difficulties UNIDO implemented several expenditure and staff reduction programmes. In the Organization's 1996-97 programme and budget, 46 posts (of which 32 were General Service staff posts) were identified for abolition under the non-voluntary phase of the staff reduction programme. The complainant's post was one of those affected. The procedure was that the Advisory Group on Human Resource Planning would make a recommendation to the Director-General concerning a staff member's retention, or separation from service. By a memorandum of 20 May 1996 the Chairman of the Advisory Group informed her that it would recommend that her appointment be terminated as of 21 June 1996.

On 31 May the complainant wrote to the Advisory Group to provide them with information about her case. By a memorandum dated 18 June she applied for separation under the voluntary separation programme. On 19 June she received from the Director of Personnel Services her official notice of termination of permanent employment, with effect from 28 June 1996.

She wrote to the Director-General on 20 June 1996 asking him to review the proposed terms of her separation, and then, more formally on 25 July appealing under Staff Rule 112.02(a) against the decision to terminate her appointment. On 18 September, the Director of Personnel Services replied on the behalf of the Director-General that the Advisory Group had been "... unable to identify a suitable post in which [her] services could be effectively utilized", and that the decision to terminate her appointment would be maintained. She appealed against that decision to the Joint Appeals Board on 14 November 1996, which in a report of 22 December 1997 recommended the rejection of her appeal in its entirety. By a memorandum dated 16 January 1998, the Director-General endorsed the recommendation of the Joint Appeals Board. That is the impugned decision.

B. The complainant contests the abolition of her post; the duties of the post were transferred to another secretary under a fixed-term contract and with fewer years of experience, so the post was never abolished.

She claims that the decision to terminate her permanent appointment with UNIDO violated Staff Rule 110.02(a) since as a staff member with a permanent appointment she should have been retained "in preference to those on fixed-term appointments". It was improbable that no suitable grade G.5, G.4 or G.3 "fixed-term post" was available, particularly given her performance and experience over twenty-three years. UNIDO did not act in "good faith" in her case nor did it conduct an effective search for alternative posts, since only a few posts were properly considered.

She states also that the Joint Appeals Board misinterprets Staff Rule 110.02(a) because it defines "available suitable posts" as posts occupied by other staff members or vacant posts available in areas with similar qualification requirements. The phrase "availability of suitable posts" means that as a permanent staff member, she had a right to be considered and placed against any post for which she was qualified, regardless of whether the post was similar to the post abolished.

The termination of her appointment, she submits, is inconsistent with criteria applied for determining if a staff member is to be retained as set out in bulletin DGB(M).5 of 16 January 1996. She fulfills those criteria, particularly those of "relative competence," "integrity," and "efficiency and effectiveness;" so she could have been easily appointed to another assignment in the Organization.

She states that she was given the "false impression" that her appointment was secure because she received many verbal assurances from her supervisor and UNIDO management that "[she] would be alright" and that a post among the G.4 and G.5 fixed-term staff would be found for her. Had this not been the case, she would have accepted a post at a lower grade immediately, searched for other vacancies or opted for the "voluntary separation programme".

She claims that UNIDO showed "hostility" towards permanent staff members or at least a "lack of interest" in protecting them. It focused on the reduction of permanent staff at all costs. She also states that the Organization failed to provide her with assistance in securing employment elsewhere.

She seeks the following redress: (a) the quashing of the findings of the Joint Appeals Board dated 22 December 1997; (b) the quashing of the Director-General's decision of 16 January 1998 confirming her dismissal on 28 June 1996; (c) reinstatement and placement on any post she is qualified for at her grade (or a lower one); and, (d) payment of salary and "other benefits including pension fund and health insurance" from the date of termination up to her reinstatement, less any terminal payments already received; or, (e) payment equivalent to the salary and allowances that the complainant has been deprived of by the challenged decision (in particular, the salary and allowances that she would have been reasonably expected to receive from the date of termination up to the date of her early retirement, that is 2 March 1998); alternatively, the grant of two-and-a-half years' leave with pay; alternatively, if reinstatement is not possible, an "enhanced termination indemnity (i.e. plus 50 per cent and the Organization's commitment to contribute its share toward the Pension Fund and [health insurance] for 30 and 21 months respectively) thus placing her on par with the staff that had negotiated their voluntary separation"; (f) damages for moral injury, and (g) costs.

C. The Organization requests that the complaint be dismissed in its entirety as it is unfounded. It states that the complainant's assertion that her post was not abolished but merely reassigned to a colleague of a lower grade is unfounded. Her post was indeed abolished as it was deleted from the UNIDO programme budget as of January 1996 and the professional for whom she had worked was reassigned to other duties in a different unit.

The complainant contends that she had the false impression that her job was secure. That impression stemmed from her personal desires and her own interpretation of certain conversations. She had until 8 January 1996 to apply for the voluntary separation package but she did not do so in time, and therefore could not be considered.

The allegations of the improper application of the staff retention criteria as set out in bulletin DGB(M).5 and the violation of Staff Rule 110.02(a) are not substantiated by the facts of her case. The Advisory Group identified four potential posts for her placement. The complainant's position was considered in the course of fifteen sessions, but the Group decided to recommend to the Director-General that her appointment should be terminated on 28 June 1996.

Staff Rule 110.02(a) which states that staff members with permanent appointments are to be retained in preference to those on fixed-term appointments, paying due regard to "relative competence," "integrity" and "length of service" must be supplemented by paragraph 8 of the bulletin which provides additional criteria such as "efficiency" and "qualifications and skills related to key priority themes, programmes and essential functions".

The Organization states that the complainant was considered for available posts, including lower-level posts, and was found not suitable for any of them. She was measured unsuccessfully against two fixed-term G.5 staff, and against other permanent staff. It maintains that the complainant received fair and objective consideration for suitable available posts in accordance with its rules, policies and procedures.

D. In her rejoinder, the complainant enlarges on her pleas.

She maintains that no careful search was made for a post for her, although she identified in a memorandum the posts that she was qualified for and she had discussions about them with heads/chiefs of unit. According to her, the Advisory Group chose to ignore this memorandum in violation of its own procedures. There was a "lack of transparency" and no respect for the "letter and spirit" of Staff Rule 110.02(a). This prejudiced her position.

The Organization has not addressed why her colleague was ultimately retained in preference to her, and why she could not have continued to perform these same duties.

E. In its surrejoinder the Organization rejects the complainant's claim that the Advisory Board failed to respect its own procedure as unfounded.

Regarding the definition of "availability of suitable posts," the Organization adds that in connection with the preferential retention of permanent staff stipulated by Staff Rule 110.02(a), there is also the requirement which states "in which their services can be effectively utilized". This determination is within the discretion of the Advisory Group which concluded that no suitable post could be identified in which the complainant's services could be effectively utilised.

The Organization rejects the complainant's claim that UNIDO was disinterested in protecting permanent staff, and that it even showed "hostility" toward them. The Advisory Group was established with staff and administration members to implement the separation programme in an "orderly and equitable manner". The Organization also provided assistance in finding employment, of which the complainant chose not to avail herself.

F. In further submissions the complainant states that she did in fact respond to a letter dated 8 July 1996 from the employment assistance workshop organiser, and subsequently attended that workshop. It was not helpful since it made no suggestions as to potential employers that might be approached, and since more concrete personal assistance could only be provided at her own cost.

G. In comments on those submissions the Organization rejects as unfounded the complainant's assertion in the matter of the employment assistance. It states that two companies were retained and would provide services to individuals affected by the non-voluntary separation programme, for which the Organization would pay.

CONSIDERATIONS

1. The complainant is of Austrian nationality and joined UNIDO in 1973. She received a permanent appointment in 1976 and she has been at grade G.5 since 1982. As part of the staff reduction policy undertaken by the Organization to deal with financial difficulties it had been facing since 1993, her post was abolished and, upon failure of the attempts to redeploy her, her appointment was terminated as of 28 June 1996 by a decision contained in a letter sent on 19 June. She appealed against this decision, but the Director-General endorsed the recommendation of the Joint Appeals Board to reject the appeal. The Tribunal has before it a complaint which is receivable, concerning the impugning of the decision of the Director-General of 16 January 1998 confirming the decision of 19 June 1996.

2. Before examining the merits of the complaint, it is worthwhile to recall the process engaged by the Organization to attain its aim of restructurisation and staff reduction since 1996. By instructions of 28 July 1995, the Director-General created an Advisory Group on Human Resource Planning, a joint body comprising an equal number of administration and staff representatives, with the responsibility of evaluating staff needs and

recommending a redeployment strategy. Then, in a bulletin of 20 November 1995, he announced a voluntary separation programme which provided favourable measures for staff members who requested early retirement or agreed separation. To benefit from these advantages requests had to be submitted before 8 January 1996. Finally, the Director-General announced, in a bulletin of 16 January 1996, that the voluntary separation programme had not yielded sufficient results and that it was therefore necessary to introduce non-voluntary staff reduction measures: in a first phase, managers were responsible for identifying, before the end of January, programmes which should be scaled down or discontinued and, as a result, the posts which should be abolished. Then, in a second phase, Staff Regulation 10.3(a) and Staff Rule 110.02(a), concerning post abolition as a result of the necessities of the service would be applied. Article 10.3(a) of the UNIDO Staff Regulations reads as follows:

> "The Director-General may terminate the appointment of a staff member who holds a permanent appointment if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory, or, if the staff member is, for reasons of health, incapacitated for further service."

Staff Rule 110.02(a) provides:

> "If the necessities of the service require abolition of a post or reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on fixed-term appointments, provided that due regard shall be paid in all cases to relevant competence, to integrity and to length of service ..."

3. According to the Director-General's bulletin of 16 January 1996, the Advisory Group was to recommend retention or termination of staff members whose posts had been abolished by applying the following principles:

> "In accordance with staff regulation 10.3 and staff rule 110.02, staff members whose posts are abolished will be measured against available suitable posts to ascertain whether their services can be effectively utilized in those posts. In all such cases due regard shall be paid to the following criteria:
>
> - Relative competence
> - Integrity

> - Efficiency and effectiveness
> - Qualifications and skills related to key priority themes, programmes and essential functions
> - Length of service
> - Geographical and gender balance.
>
> ... The term 'available suitable posts' in which the staff member's services can be effectively utilized means posts occupied by other staff members or available vacant posts in areas with similar qualification requirements."

4. The complainant did not wish, at least initially, to benefit from the advantages given to staff members who agreed to voluntary termination since she thought, as she believed herself to have been told by her immediate supervisor, that her post was not in danger. Having learned by a memorandum of 23 February 1996 that her post was identified for abolition, she made several applications to UNIDO heads/chiefs to obtain a post, stressing her seniority and the very positive evaluations obtained throughout her career and she defended her position before the Advisory Group. Her applications were examined for several posts, but preference was given to other staff members and, on 20 May 1996, she was informed that the Advisory Group had been unable to identify a post where her services could be effectively utilised. She submitted, as she had been invited to do, additional information to the Advisory Group, but the Group maintained its position. On learning that two posts in which she had been interested had been filled by other permanent staff members, she asked on 18 June 1996 to benefit from the provisions regarding voluntary separation but such a request should have been notified to the Organization by 8 January, and on 19 June, she received a letter notifying her of the termination of her appointment.

5. To obtain the quashing of the decision that she impugns, the complainant asserts first, that her post was not abolished. She claims that her functions were in fact reassigned to a staff member of a grade lower than hers. But the defendant demonstrates that the abolition of the post was due to the merger of two divisions and by the assignment of the professional staff member for whom the complainant had worked to another unit. The abolition of this post (GS 100331) cannot be regarded as unconnected to

the interests of the service and the restructurisation process carried out by the Organization.

6. Secondly, the complainant contends that the impugned decision was in breach of Staff Rules 110.02(a) quoted above, in so far as preference was not given to her, a permanent staff member, but rather to staff members holding fixed-term contracts: the Administration should at the least have indicated to her the existence of other fixed-term posts, even those held by other staff members at a lower grade than hers, and given her preference over the staff members in these posts, whose contracts were renewed. However, there were conditions attached to the preference referred to in the provision cited by the complainant, and the Organization legitimately compared the suitability of the complainant with that of other staff members before retaining those most competent to carry out the particular duties.

7. Moreover, assessment of the competence of staff had to be carried out in accordance with the Director-General's bulletin of 16 January 1996. On this point, the complainant maintains that the criteria set out in the bulletin were not properly taken into account. But no element in the file supports this: while the complainant is right to highlight her excellent and faultless career, the file shows that the process for measuring her suitability against those in competition with her was carried out according to the rules and guarantees set out by the Director-General's bulletin. The Advisory Group began by examining her suitability for ten posts potentially open to her, then more particularly for four posts. In two cases where she would have replaced fixed-term employees, it appeared first, that she lacked the proficiency in Spanish required from a secretary in a Latin American programme; and secondly that the person with whom she had exchanged a post in 1994, and with whom she was now in competition, had been performing her duties satisfactorily and had been given very positive evaluations for sixteen years. She was also considered for two other posts, in competition with candidates holding permanent contracts, and was interviewed by the relevant heads of unit. But in both instances she was ranked below the other candidates. There is no evidence that the examination by the Advisory Group and the Director-General of the

suitability of the complainant and the other staff members failed to take the criteria in the Director-General's bulletin into account.

8. The file also shows, contrary to allegations, that the Organization did indeed seek a post for the complainant and it did not lack sensitivity to her particular case, where after twenty-three years of very good service, she had lost her post and had been placed in difficult personal circumstances. In this case there are none of the reasons which led the Tribunal to quash decisions of termination of employment carried out by UNIDO under their staff reduction programme (see Judgments 1772 *in re* Tueni, 1782 *in re* Zaunbauer and 1830 *in re* Weber). The Organization took its decision after a long and complicated procedure before the Advisory Group, and has committed no formal irregularity. The fact that the complainant's career description carries no express reference to her seven-year period as secretary to the Special Advisory Group on Energy, could not have prejudiced her, since it was quite clear that at that time she was working in the office of the Executive Director, to which the office of the Special Advisor on Energy was subordinate. Neither was the fact that she had not been clearly consulted to find whether she would accept to be redeployed in a post at grade G.4 harmful to her case, since one of the posts for which she was considered was a G.4 post which had fallen vacant but she was not found suitable for that post.

9. There is no evidence in the file showing that the Organization has not acted in good faith in this case. The complainant believed herself to be secure from the staff reduction programme, possibly as a result of misplaced encouragement by her supervisor who, according to the complainant, informed her that her post was safe. But no formal or informal promise had been made to her and, while it is regrettable that the complainant realised too late that it was in her interests to take advantage of the voluntary separation programme, there is no legal argument to justify the quashing of the impugned decision.

10. Finally, the allegations by the complainant that the Organization did not help her to find employment elsewhere are not supported by the items of evidence: in a letter of 8 July 1996 the head of the competent service listed clear proposals to assist the complainant in seeking

employment. Moreover, the complainant admits to having participated in a workshop organised to facilitate recruitment elsewhere of persons in her situation, but, in her further submissions, she complains that the training was too general in character, and states that further sessions of training of a more specific nature would have had to be funded by her. However, the defendant shows that this last allegation is not correct and the Tribunal is of the opinion, given the circumstances, that the Organization has acquitted itself of its obligation to assist her.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SEVENTH SESSION

***In re* Guirao-Sanchez**

Judgment 1886

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Carlos Guirao-Sanchez against the European Southern Observatory (ESO) on 11 December 1997 and corrected on 25 March 1998, the ESO's reply of 19 June, the complainant's rejoinder of 25 September and the Observatory's surrejoinder of 2 December 1998;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. In March 1996, the Administration of ESO submitted to the Standing Advisory Committee of the Observatory a draft revision of the Staff Rules and Regulations by which it intended to reduce by 0.5 per cent a year the amount of the expatriation allowance which the Observatory pays to international staff members, although within a certain limit. The document specified that the new revised rate of the allowance would apply from the signature of a new contract of indefinite duration, but that it would not apply to current fixed-term contracts, nor to their future renewal, nor to staff members already holding an indefinite contract. The ESO Council approved the amendment in December 1996 and it came into force on 1 January 1997.

The staff were informed by a memorandum dated 7 January 1997 from the head of Personnel.

The complainant, who is of Spanish nationality, entered the service of the ESO in 1987 as a paid associate. He was given a fixed-term contract for one year, which was renewed on two occasions. In 1990, he obtained a contract as a member of the international staff for a duration of three years. This contract was extended on several occasions, for one year, two years and three years. His expatriation allowance amounted to 12 per cent of his basic monthly salary.

On 2 May 1997, an official of Personnel Services offered the complainant a contract of indefinite duration with effect from 1 July 1997. This letter specified that the contract was subject to the "provisions of the Combined Staff Rules and Staff Regulations, edition 1.4.1993, valid as of 1.1.1997". It also indicated that "with the granting of this new contract of indefinite duration, the expatriation allowance [would] be reduced as stipulated in [Article] RA 5.04 of the Staff Regulations". The complainant accepted the contract on 26 May and added the reservation "without prejudice of my acquired rights".

By a letter of 10 June, an official of Personnel Services drew the complainant's attention to the fact that the contract offered on 2 May was a "new contract" and not an extension of his current one, and that consequently it was governed by the Staff Rules and Regulations valid at the date of the signature of the contract. In a letter dated 8 July, another official of Personnel Services informed the complainant that the granting of the new contract of indefinite duration meant that his expatriation allowance would be reduced *pro rata* as stipulated in Article R A 5.04 of the Staff Regulations. Attached to this letter was salary action form No. 30, showing the expatriation allowance at the revised rate of 11.5 per cent from the effective date of 1 July 1997, amounting to a decrease of 0.5 per cent in relation to the previous rate.

On 6 August 1997, the complainant appealed directly to the Director General against the decision of 10 June 1997. In a letter of 16 September 1997, which is the impugned decision, the head of Administration informed the complainant that the decision to reduce his expatriation allowance had been maintained and that he could refer his case to the Tribunal.

B. The complainant has two pleas.

First, the impugned decision is based on a flawed classification of the contract offered on 2 May and signed on 26 May 1997. The complainant contests the classification of this contract as a "new contract" in so far as it would constitute a renewal of a contract of employment with the effect of interrupting the legal links with his previous contracts. In support of his plea, he cites an advisory opinion of the International Court of Justice of 1956 and various judgments of the Tribunal. He contends that by acting as it has the Observatory is denying him any benefit from the seniority acquired during his work with the ESO, and that its view infers that the conclusion of a new contract would annul the conditions of employment acquired previously. He contends that an employment relationship should go beyond the award of successive contracts to a member of staff.

Secondly, the impugned decision is a breach of the complainant's acquired right to the maintenance of his expatriation allowance. Basing his argument on the case law of the Tribunal, according to which a right may be classified as acquired when breach of it would impair the essential and fundamental conditions of employment of a member of staff, he contends that the expatriation allowance is one of those conditions. He adds that the changes made are not only unjustified, but can also be condemned on the grounds of the arbitrary and unequal criteria of their application, namely the effective date of the new contract, irrespective of seniority. He questions how the former more favourable rate can be maintained for staff members holding fixed-term contracts before 1 July 1997, and even for any future and unlimited renewal of their contract, while it is being refused to other staff members, like the complainant, who have benefited for nearly ten years from the very situation under the rules which is now pressed for by the Observatory. The Administration is therefore guaranteeing to some staff members what it is refusing to others by considering that a "new" contract concluded after a certain date impairs the fundamental and essential nature of conditions of employment which are nevertheless identical for all categories of the staff.

Finally, describing the effects which he says the decrease in the rate of the expatriation allowance has on him, the complainant contends that the change breaches his right that his remuneration should not be eroded substantially.

He asks the Tribunal to set aside the decision of 16 September 1997, refusing to grant him the "full expatriation allowance to which he is entitled", and to award him consequent redress and costs.

C. As regards the receivability of the complaint, the Observatory contends that the letter of 16 September 1997 from the head of Administration merely confirmed the decision of 8 July. The only new decision which it contained concerned the authorisation accorded to the complainant to appeal directly to the Tribunal. The ESO states that it expects the Tribunal to adopt the same approach for this case as for *in re* Ansorge.

On the merits, it submits that the contract offered to the complainant on 2 May 1997 is a "new contract" and that it is different in its "nature" from the previous ones. It explains that nothing in the Staff Regulations would permit the interpretation of a new indefinite contract as an extension of a previous fixed-term contract or series of fixed-term contracts. In other words, there are no grounds for assuming that the terms of the initial contract would remain in force. The opinion of the International Court of Justice cited by the complainant is not material to the case as, in that opinion, the Court ruled on facts which were different in nature and governed by a different set of staff regulations. The complainant's new contract is covered by the Combined Staff Rules and Regulations as in force on 1 January 1997. The new rules for the expatriation allowance are therefore applicable to him.

The Observatory states that the offer of the contract was without any ambiguity as to the amount of the expatriation allowance payable to the complainant. If the latter did not intend to accept the new contract, he should have made his position clear. Since he did not do so, he is presumed to have accepted the conditions offered and the reservation that he made when accepting the contract is without effect.

Finally, it refutes that it acted in an arbitrary manner. It says that an international organisation may make a distinction in entitlement to the expatriation allowance between staff members holding fixed-term contracts and those holding indefinite contracts.

D. In his rejoinder, the complainant submits that the decision of 16 September 1997 has to be interpreted not only as authorising him to appeal directly to the Tribunal, but also as having explicitly dismissed the appeal that he lodged on 6 August 1997. He cites in his support the ruling on receivability made by the Tribunal in Judgment 1739 (*in re* Ansorge).

He opposes the Observatory's view that the contract offered to him on 2 May 1997 was a "new contract", because that would have the effect of making it a first contract and placing the complainant in the same situation as a staff member entering the service of the ESO for the first time.

He submits that he clearly expressed his position. It was evidently with the purpose of preserving his previous terms and conditions of employment that he added on 26 May 1997 a hand-written reservation to the contract offered to him.

Finally, he says that the Observatory does not contest that the former rate of the expatriation allowance is in the nature of an "acquired right" as it has recognised it as such for certain categories of the staff.

E. In its surrejoinder the Observatory notes the Tribunal's ruling on *in re* Ansorge in Judgment 1739 and deems that no further discussion on receivability is necessary. It submits that, if the Tribunal accepted the complainant's plea, the conclusion would be that no agreement had been reached between the two parties on the indefinite contract and that consequently the complainant is still employed on the basis of his previous fixed-term contract, which will expire on 30 September 1999. It says that upholding the complainant's view would have the consequence of depriving the Observatory of its right to review the terms of a contract due to expire when renewing it or offering a new contract.

CONSIDERATIONS

1. The complainant, a Spanish citizen, entered the service of the ESO on a fixed-term contract signed on 10 December 1987. This contract was successively extended for fixed periods until 2 May 1997, on which date he

was offered a contract of indefinite duration with effect from 1 July 1997. In the letter accompanying the proposed indefinite contract, it was stated that the contract would be "subject to the provisions of the Combined Staff Rules and Staff Regulations, edition 1.4.1993, valid as of 1.1.1997". It was indicated in the same letter that the granting of the new contract would be accompanied by a reduction in the expatriation allowance, as stipulated in the revised text of Article R A 5.04 of the Staff Regulations.

2. On 26 May 1997, the complainant returned the ESO's proposal with his acceptance and the hand-written comment "without prejudice of my acquired rights".

By a letter of 10 June 1997, he was informed that the proposed contract was considered to be a new contract of indefinite duration and not an extension of his previous contract, and that this contract was therefore governed by the Staff Rules and Regulations in force at the date of its signature. The Administration consequently intended to apply to the complainant's contract the new rate of the expatriation allowance, at its lower revised rate established in January 1997. It sent the complainant a letter dated 8 July 1997 informing him that the granting of the new contract of indefinite duration meant that his expatriation allowance would be reduced in accordance with Article R A 5.04 of the Staff Regulations. Attached to the letter of 8 July 1997 was salary action form No. 30, showing the revised rate of the expatriation allowance, namely 11.5 per cent, or a reduction of 0.5 per cent of the rate applied to the basic salary in relation to the previous rate indicated on salary action form No. 29.

3. The complainant lodged an internal appeal against the individual decision contained in the letter of 10 June 1997.

On 16 September 1997, he was informed that his appeal had been dismissed and that he could bring his case directly to the Tribunal.

4. The complainant asks the Tribunal to order the quashing of the Director General's decision, as notified in the letter from the head of Administration dated 16 September 1997, refusing to grant him the "full expatriation allowance", and to award him consequent redress.

In support of his claim, he contends first that the impugned decision is based on a flawed classification of the contract of employment of 26 May 1997 and, secondly, that the decision in any case violates his acquired rights in relation to the expatriation allowance.

5. The Observatory is accused of wrongly considering the contract signed by the complainant on 26 May 1997 to be a new contract, governed by the Staff Rules and Regulations valid as of 1 January 1997, resulting in the application to the contract of the new rate of the expatriation allowance at its lower revised level.

6. With its offer of 2 May 1997, the Observatory certainly intended to offer the complainant a new contract of indefinite duration governed by the new provisions of the Staff Rules and Regulations which were in force on 1 January 1997. The nub of the matter is therefore whether this offer was accepted without modification by the complainant.

7. The complainant was aware that the contract of indefinite duration offered to him was considered by the Observatory to be a new contract, which would be covered by the revised regulations for the payment of expatriation allowances. Indeed, it was for this reason that he believed it necessary to affix the phrase "without prejudice of my acquired rights" upon signing the contract.

He could have declined the offer made on 2 May 1997, which would have had the effect of maintaining in force the fixed-term contract that he had signed previously and would have guaranteed him the payment of an expatriation allowance at the former rate. But, in so doing, he would have risked jeopardising his employment relationship with the Observatory since, after a number of years of service, he would no longer have been in a position to receive a fixed-term contract, with no guarantee that he would have been awarded a contract of indefinite duration.

8. The complainant preferred to sign the proposed contract with a reservation which, if the reservation had been more explicit, could have been interpreted as a refusal accompanied by a counter-proposal.

By confining himself to the phrase "without prejudice of my acquired rights", the complainant showed that he had no reason in principle to refuse the offer made to him, but that he merely wished to maintain his right to continue receiving the expatriation allowance at the former rate of 12 per cent of his basic salary.

In view of the above, and the fact that the Observatory neither modified, nor proposed to modify its offer, despite the complainant's reservation, it has to be deduced that the employment relationship between the complainant and the Observatory is based on a contract concluded after 1 January 1997. It is therefore a priori governed by the Staff Rules and Regulations which were in force at that date, unless it is considered that the complainant could enjoy rights deriving from the legal relationship existing between the parties before the conclusion of the new contract on 26 May 1997.

9. The complainant submits that he had acquired rights in relation to his terms and conditions of employment, which he considers to be essential and fundamental, including the guarantee of the previous more favourable rate of the expatriation allowance.

The Tribunal concedes that the complainant could have acquired rights in relation to his terms and conditions of employment since, contrary to the contentions of the Observatory, the fact of accepting the offer of a new contract of indefinite duration cannot deprive the complainant of the rights he acquired whilst he was in the service of the Observatory under successive fixed-term contracts.

However, as the Tribunal has indicated, among others, in Judgments 366 (*in re* Biggio No. 3 et al) and 371 (*in re* Mertens No. 2) the outright abolition of the expatriation allowance would violate an acquired right, although there is no acquired right to the amount and the conditions of payment of the allowance. Indeed, the staff member should expect amendments to be prompted by changes in circumstances if, for example, the cost of living rises or falls, or the organisation reforms its structure, or even finds itself in financial difficulty. In the present case, the complainant does not challenge the new system of the progressive reduction of the expatriation allowance over a certain period resulting from the Observatory's decision, taken in line with the Coordinated Organisations and for various reasons – principally related to budgetary restrictions – to decrease the rate of the expatriation allowance paid to members of the international staff.

Since it consists of a progressive reduction of the expatriation allowance, and not its outright abolition, resulting from general budgetary restrictions, the Tribunal finds that the impugned decision does not violate the right of the complainant to the maintenance of his acquired rights.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SEVENTH SESSION

Judgment 1887

***In re* Argos (No. 3), Eritja (Nos. 2 and 3), Flösser (Nos. 3 and 4), Glöckner (Nos. 3 and 4) and Olivo (Nos. 3 and 4) (Application for execution)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second application for the execution of Judgment 1682 filed by Mr Patrick Argos, Mr Ramon Eritja, Mr Hans Flösser, Mrs Godefrida Glöckner and Mr Jean-Christophe Olivo on 31 July 1998 and corrected on 20 August, the reply of 29 October 1998 from the European Molecular Biology Laboratory (EMBL), the complainants' rejoinder of 22 January 1999 and the Laboratory's surrejoinder of 19 April 1999;

Considering the third application for the execution of Judgment 1682 filed by Mr Ramon Eritja, Mr Hans Flösser, Mrs Godefrida Glöckner and Mr Jean-Christophe Olivo on 11 September 1998, the reply of 29 October 1998 from the EMBL, the complainants' rejoinder of 22 January 1999 and the Laboratory's surrejoinder of 19 April 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. The Tribunal, in Judgment 1682 of 29 January 1998 decided:

> "1. The decisions of 11 September 1995 by the Director-General of EMBL are quashed in so far as they refused to review the complainants' entitlements to adjustments in pay for 1995.
>
> 2. The complainants are sent back so that the Laboratory may take new decisions as set out in 6, 8 and 9 above.
>
> ..."

At its session of 2 July 1998, the Council of EMBL decided not to alter the amount previously fixed for adjustments in pay for 1995, in application of Judgment 1682.

2. Certain EMBL staff members contested this decision, considering that it was not in conformity with Judgment 1682.

(a) Mr Ramon Eritja, Mr Hans Flösser, Mrs Godefrida Glöckner and Mr Jean-Christophe Olivo each submitted an internal appeal to the Director-General, asking him to quash the first application to them of this decision, which they held was contrary to Judgment 1682.

By decisions of 31 July 1998 the Director-General rejected the appeal statements as irreceivable for non-respect of the internal procedure.

On 11 September 1998 the same staff members appealed to the Tribunal against that decision. While they submitted claims on the merits ("quash the impugned decision, that is, rule that the EMBL should give full application to points 1 and 2 of the decision of Judgment 1682, in spite of the Council's resolution of 2 July 1998 ..."), at no point in their brief attached to the complaint do they state why the objection to receivability should be unlawful. This they do in their rejoinder, in particular by deploring the Director-General's over formal approach as displayed by his opinion that the appeal statements were unsubstantiated, while he was perfectly aware of the complainants' reasoning.

(b) On 31 July 1998, Mr Patrick Argos, Mr Ramon Eritja, Mr Hans Flösser, Mrs Godefrida Glöckner and Mr Jean-Christophe Olivo had come straight to the Tribunal. They challenged the application to them of the Council's decision of 2 July 1998.

3. The two groups of complaints are brought by the same complainants, except that Mr Argos challenges only the individual decision in his case (under 2(b)) without appealing to the Director-General. The same initial decision is contested by all complainants. The problems of receivability are also similar.

The cases can therefore be joined.

Formal flaw in drawing up complaints

4. The Laboratory states that the two groups of complaints are invalidated because of a formal flaw. One group of complainants does not specify the challenged decision in the third part of the Registry complaint form, and the other group "does not challenge a new final decision" under the terms of Article VII of the Tribunal's Statute.

It is true that the Argos (No. 3) and others complaints are drafted as applications for execution and part 3 is not filled in, while the pleadings in the fourth part call for a ruling obliging the EMBL to execute Judgment 1682, "in spite of the Resolution of the Council of 2 July 1998". In the Eritja (No. 3) and others complaints, the third part contains the date of the text of the challenged decision (31 July 1998), while in part four the complainants ask the Tribunal to "quash the challenged decision" and rule that the Laboratory shall execute Judgment 1682 "in spite of the Resolution of the Council of 2 July 1998".

According to Article 6(1)(a) of the Rules of the Tribunal, the complainant must fill up in English or French the complaint form as prescribed in the Schedule to its Rules; the Schedule lists the five following parts of the complaint form headed: (1) The complainant, (2) The defendant organisation, (3) The challenged decision, (4) The pleadings (relief claimed, list of documents, etc.) and (5) Special applications.

If the complaint does not meet the requirements of the Tribunal's Rules, the Registrar shall in accordance with Article 6(2) of the Rules call upon the complainant to correct the deficiency within thirty days; so the flaw can be corrected.

There is no reason, at this stage, to examine particular flaws in an application for execution, where, following a judgment by the Tribunal, the organisation takes a decision which the complainant holds to be unfavourable. In any event, the plea is without merit: only if the complainant had failed to respond to requests to correct the alleged flaw would the complaints have been deemed invalid; which was not the case.

It should be noted, however, that the Registrar was right in considering it unnecessary for the complainants to correct their complaint forms, since the contested decision was sufficiently clearly indicated for the form to fulfil its purpose.

Receivability of the complaints lodged directly with the Tribunal

5. All the complainants submitted their applications directly to the Tribunal in respect of the new decisions regarding adjustment of pay for 1995 taken by the Laboratory after the delivery of Judgment 1682 without having prior recourse to internal appeal procedures.

The Laboratory argues that the complaints are irreceivable under Article VII(1) of the Statute of the Tribunal since the complainants have not exhausted the internal means of redress. The complainants assert that this is not necessary before submitting an application for execution.

The Tribunal's case law has it that exhausting all internal remedies is not in fact necessary in cases which involve determining whether the authority responsible for executing a judgment has respected its terms. It is however in principle essential when a case is sent back to that authority to resume or continue the procedure and when the judgment leaves it a degree of discretion. However, with a view to avoiding a sheer pedantic approach, the Tribunal will waive the requirement for exhaustion of internal remedies where no legal purpose is served, for exemple where the case is fit to be judged and the parties have submitted their pleas (see Judgment 1771 *in re* de Riemaeker No. 4, and the case law cited therein).

In the present case the competent authority certainly had a degree of discretion; however, the applications are directly linked to Judgment 1682 and to whether the new decision is in line with that Judgment; and the parties have submitted their pleadings. Moreover, in the procedure prior to delivery of that judgment the Laboratory had allowed the complainants to dispense with an internal appeal. As such, obliging the complainants to seek first internal redress and thus lengthen the procedure, would be a mere formality. Therefore, the complaints are receivable.

6. Since all the complaints are receivable, there is no need to rule on the plea of irreceivability based on the complainants' failure to exhaust all internal remedies.

On the merits

7. The complainants contend that the Laboratory has not executed Judgment 1682 because it has merely confirmed its previous decision regarding adjustment of salaries for 1995 for purely budgetary reasons which, they say, are contrary to the considerations of that judgment. They assert that they should be granted the full salary adjustment decided upon by the Coordinated Organizations.

The EMBL admits implicitly that in the challenged decision it did not grant the entire adjustment, but only the adjustment amended by the forty-fifth report, for 1995, excluding the adjustment stipulated by the fortieth report. The Laboratory points out that if the Tribunal had wanted it to make the full salary adjustments recommended in the fortieth and forty-fifth reports of the Coordinated Organizations, "the judgment would have given unequivocal instructions to this end" but it did not do so. Since the Coordinated Organizations' adjustments were to be considered as a "guide", "adequate reasons" could justify "departing from the decisions of those Organizations". The Laboratory also asserts that the Council's Resolution of 2 July 1998 only applies the adjustment provided for in the forty-fifth report of the Coordinated Organizations, and not the fortieth report, since account had already been taken of the latter adjustment when the 1994 salaries were fixed. It adds that:

> "all retroactive adjustment of salaries for 1995, 1996 and 1997 would affect both the calculation and everything depending on it, as well as parity between the various antennae of the service ... the Council had subsequently been able to accept and apply the Coordinated Organizations' salary adjustments for 1998 in their entirety".

8. At the stage of execution of a judgment by the parties and also when making an application for execution, the judgment carries the authority of *res judicata*, and must be executed as ruled. It may not be called into question. It will need interpreting only if its ruling is deficient or not sufficiently clear.

9. Judgment 1682 is in fact based on the failure to take account of all the decisions of the Coordinated Organizations in setting pay for 1995 (under 8 *in fine*) and in particular on the fact that "EMBL refused the increases recommended in the 40th [report]" (under 7 *in fine*).

In principle, those facts could not be called into question at the time the judgment was executed.

In any event, the Laboratory does not contend that those facts were incorrect. Although it asserts that the fortieth report had already been taken into account when adjusting pay for 1994, it appears clearly from the working documents on which the Council based its decisions that, among the various possibilities considered, non-application of the fortieth report was the option that was retained. The defendant does not claim that the level of remuneration decided upon by the Coordinated Organizations was reached for 1995; on the contrary, it puts forward arguments to justify departure from those recommendations. At the same time it said that full application of the Organizations' recommendations would have been costly, but that they had been fully applied when fixing pay for 1998. The working documents mentioned above indeed show what would have been the cost for the Laboratory of a full application, while implementation of the forty-fifth report alone did not involve any new charge.

According to facts given in Judgment 1682, the 1995 remuneration did not take account of the decisions made by the Coordinated Organizations. The same is apparent in the Council's new Resolution of 2 July 1998.

10. Judgment 1682 notes that Article R 4 1.01 of the Regulations ensures that remuneration shall be reviewed in accordance with the decisions of the Coordinated Organizations; the Laboratory must have "proper reasons" for departing from this Regulation; it must establish the existence of such reasons (in this connection see Judgment 1807, *in re* Storm). As to what may be considered as "proper reasons", the Tribunal notes in Judgment 1682 under 7, regarding previous adjustments, that "the Laboratory often let budgetary policy prevail. However understandable that may be, such policy must not supplant the rule of law"; the Judgment therefore shows that budgetary policy alone does not constitute a sufficient reason for not applying the adjustments decided upon by the Coordinated Organizations'.

Judgments of the Tribunal - of which several were cited by the Laboratory - regarding taking account of economic difficulties during salary adjustment, do not apply in cases where the staff have obtained a statutory guarantee that the adjustments will be made in line with the Coordinated Organizations' system; such a rule must be applied, as long as it has been neither revoked nor amended.

The purpose of the salary adjustment provided for in Article R 4 1.01 is to maintain purchasing power. In cases where a previous adjustment was not high enough to maintain the level yielded by the methodology of the Coordinated Organizations, the staff can claim the shortfall when a new adjustment is made. In this connection, the Tribunal considered under 3 in Judgment 1682, that while the complainants could not seek a retroactive salary increase for a period for which they had not challenged their pay slips, they could do so for the material period "in keeping with the principles they rely on". The principle was not challenged by the Laboratory, which believed it essential to examine the adjustments called for in the fortieth and forty-fifth reports, but decided that in view of the circumstances only the adjustments in the forty-fifth report should be retained. In this way the Tribunal also noted that "EMBL refused the increases recommended in the 40th [report]" (under 7 *in fine*) and that, in setting pay for 1995, the Laboratory had not taken account of "the decisions of the Coordinated Organizations" (under 8 *in fine*). The Tribunal therefore invited the EMBL to take the decisions set out under 6, 8 and 9 of its judgment.

11. In the present case the challenged decision is based on financial considerations: on the one hand the Laboratory's budgetary limitations, and on the other hand its desire to finance staff increments in 1995. It also needed to meet the expenses arising from freezing posts in 1994 and carry out investment needed to further the Laboratory's research, without putting jobs in jeopardy.

In the terms of Judgment 1682 and the precedent cited therein, especially Judgment 1419 (*in re* Meylan and others) under 27 to 30, financial considerations, no matter how understandable they may be, do not constitute a valid reason for not applying the Laboratory's commitment to adjust salaries according to the Coordinated Organizations' system. The case might be different were it not for Article R 4 1.01, which the Laboratory itself drafted and which it should respect, according to the rule of *patere legem*. The quasi-contractual nature of this clause obliges the Laboratory to give it priority consideration when making budgetary choices.

The Laboratory also points out that remuneration for 1998 was set in conformity with the decisions of the Coordinated Organizations. However, this does not compensate for insufficient pay for 1995.

12. The Laboratory must therefore apply the decisions for the period in question. The evidence shows that the Council's Resolution of 2 July 1998 does not satisfactorily execute Judgment 1682; the individual measures taken in application thereof must be rescinded. The imposition of a penalty is not justified in the present case, since there is no reason to doubt execution. Interest is granted at the rate fixed under 9 of Judgment 1682, which provides sufficient compensation.

Since the applications are allowed, the complainants are awarded costs.

DECISION

For the above reasons,

1. The challenged decisions are set aside.
2. The cases are sent back to the EMBL so that it may take the decisions set out in 12 above.
3. The Laboratory shall pay the complainants a total of 20,000 French francs in costs.
4. The complainants' other claims are dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SEVENTH SESSION

***In re* Oberoi (No. 2)** **Judgment 1888**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Krishan Chandra Oberoi against the World Health Organization (WHO) on 24 February 1998, the WHO's reply of 5 June, the complainant's rejoinder of 27 July, and the Organization's surrejoinder of 10 November 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is of Indian nationality and was born in 1936, joined the WHO's Regional Office for South-East Asia (SEARO) at New Delhi on 3 September 1962 as a clerk-typist at grade ND.3. He was promoted to ND.4 in 1969, to ND.5 in 1979, and to ND.6 as an assistant in 1983. His post was regraded from ND.7 to ND.8 in 1987. He received three meritorious salary increases under Staff Rule 555.2 on completion of twenty, twenty-five and thirty years of service, and another one under Rule 555.1.

By a letter dated 11 August 1995, the Regional Personnel Officer informed the complainant that he had been selected for the post of special assistant in the Leprosy Unit at grade ND.X. His promotion would take effect from the date of his arrival on the new post. He joined the Unit on 14 August 1995 and retired on 31 July 1996.

By a letter of 24 August 1995, the Personnel Officer informed him that the effective date of reassignment and promotion had been established as 14 August 1995, the date of his arrival on the new post. This was confirmed by a memorandum dated 29 August.

Following the introduction of a new salary scale (Revision 37) announced by SEARO on 2 June 1995 with retroactive effect to 1 July 1994, the complainant had also become eligible for a spouse allowance on 1 January 1995.

On 27 June 1996, the complainant appealed to the regional Board of Appeal challenging the date of his promotion and the effective date of payment of his spouse allowance. He alleged "continued" personal prejudice under Staff Rule 1230.1.1 and failure to observe or apply correctly the Staff Regulations and Rules under Rule 1230.1.3. On 7 January 1997, the majority of the Board found the effective date of promotion to be 14 August 1995. The Board recommended unanimously that the spouse allowance was payable from 1 January 1995. It was unable to find any substantive evidence to prove the complainant's claim of personal prejudice or bias. By a letter of 5 February 1997, the Regional Director dismissed his appeal.

The complainant gave notice on 2 April 1997 of his intention to appeal against this decision to the WHO headquarters Board of Appeal. On 5 November 1997 the Board concluded that both the date of promotion and date of allocation of his spouse allowance were correctly fixed by SEARO in accordance with the Staff Regulations and Rules. The Board also found no substantive evidence of personal prejudice against the complainant. It recommended that the appeal be dismissed. By a letter dated 29 December 1997, the Director-General endorsed the conclusions of the Board and dismissed his appeal. That is the impugned decision.

B. The complainant has three pleas. First, he submits that under Manual paragraph II.5.400 the effective date of promotion is the "first of the month nearest the date on which the promotion is finally approved". This is borne out by Rule 380.3 which says that any increase in salary shall take effect from the first of the month closest to the date it was approved. In his case, the date of promotion should have been 1 August 1995.

Manual paragraph II.5.440 provides that the "effective date for any reassignment is the date of arrival on the new post". But, he says, that is an exception applying only to promotion concurrent with reassignment. In his case there was no promotion by reassignment as he was promoted through competitive selection.

Further, his promotion was the first in SEARO to take effect from the date of arrival on the post rather than from the first of the month, and the complainant refers to other promotion cases where the incumbents were promoted from the first of the month. The date established for his promotion is one example of a series of actions on the part of the SEARO Personnel Unit to harass him.

Second, the complainant states that following the 37th Revision in the General Service salary scale which came into force retroactively on 1 July 1994, the gross annual occupational earnings of his spouse became less than the limit specified in Rule 310.5.1.2. and as such, he became eligible to draw the spouse allowance. He argues that in the absence of precise instructions under Rule 310.5 regarding changes in dependency status, he should be entitled to spouse allowance as from 1 July 1994. He submits that this is the second example of harassment against him by the Personnel Unit.

Third, he argues that there was personal prejudice against him on the part of SEARO. He states that "the nub" of his complaint is "the moral and material injury done to [him]" by those in the Personnel Unit. He presents several instances when Personnel allegedly "resorted to fraudulent means in killing the prospects of [his] application[s] for professional assignments".

He seeks the quashing of the Director-General's decision of 29 December 1997; promotion to ND.X as from 1 August 1995, and the payment of salary accordingly; entitlement to the spouse allowance as from 1 July 1994, and payment of it "at the admissible rate" up to 31 December 1994; the sum of 100,000 United States dollars for "grave injury, moral prejudice, mental torture, and total loss of reputation"; compensation for the "loss suffered for not bringing his double-meritorious award case to the attention of the Meritorious Increase Committee, despite several reminders" by his Director; and 1,200 dollars in costs.

C. The Organization replies that the complaint is irreceivable on three grounds. First, the complainant failed to dispatch a notice to appeal against SEARO's decision about his promotion date to the regional Board within sixty calendar days of receipt of its notification. He filed it on 3 June 1996, ten months after the final decision was communicated to him on 29 August 1995, and eight months after the personnel action form was issued on 10 October 1995, contrary to Staff Rule 1230.8.3. He was well outside the time limits.

Second, the complainant's claim for the spouse allowance is irreceivable given that all staff were advised on 2 June 1995 of the salary scale change. To be receivable, he should have made his claim by 1 August 1995, that is, within sixty calendar days, whereas he filed his intention to appeal on 3 June 1996. His appeal was time-barred.

Third, his claim for "moral and material injury" due to alleged actions by SEARO is irreceivable for failure to exhaust the internal means of redress, because the complainant's appeal to the regional Board of Appeal was formally withdrawn on 4 September 1995.

The Organization argues that the complainant's promotion was by "reassignment". Thus, the date is governed by Manual paragraphs II.5.400 and 440. Paragraph 440 states, in part, that "the effective date for any reassignment is the date of arrival at the new post or new official station". The complainant assumed the post on 14 August 1995, therefore his effective date of promotion was that same day. He is mistaken in contending that paragraph 440 applies only in exceptional cases. It is also incorrect to argue that he was not "reassigned" since there was a competition.

The Organization explains that the former practice whereby all new promotions took effect on the first of the month and not when the staff member took up the new post "arose from an oversight". That is evidenced by the fact that SEARO's practice was not followed at WHO headquarters or in any other regional office. SEARO changed its practice as from 1 August 1995.

According to Rule 310.5 a staff member in the General Service category is entitled to an allowance for a dependent spouse if his or her "gross occupational earnings ... do not exceed during any calendar year" a limit "equivalent to the gross base salary of the lowest general service category entry level in force on 1 January of the year concerned at the place of work". On 2 June 1995 all General Service staff members were advised that Revision 37, which announced a change of salary scale, would have retroactive effect to 1 July 1994 with respect to the determination of salary. The complainant's claim that Revision 37 has retroactive effect is incorrect with respect to the determination of the spouse allowance. A staff member's entitlement to spouse allowance was governed by Rules 310.5.1 and 310.5.1.2. Therefore, for the year 1994, Revision 36 which established the limit at 73,330 rupees is applicable in the complainant's case.

Furthermore, Rule 310.5.1.2 applies equally to all General Service staff, including those who joined the Organization after 1 January of a given year. The salary scale in force on 1 January of the year in which an individual joins the Organization is the scale used for determining spouse allowance, even if it is later revised.

Finally, no personal prejudice or bias against the complainant entered into the decisions about the effective date of his promotion, his award of the spouse allowance, his applications for professional advancement, or any other administrative decision affecting him. His allegations are unfounded.

D. In his rejoinder, the complainant reiterates his pleas and expands on the alleged "continued prejudicial actions of the Personnel Officer" at SEARO. The Personnel Officer made him the target of many "atrocities", including allegedly informing the United Nations by a fax of 4 May 1993 that his application, in response to a vacancy notice, was part of a batch of "junior and unfit" applicants.

He submits that the matter of the double meritorious increase award remains unconsidered since both the regional Board of Appeal and the headquarters Board of Appeal did not address this point in his previous appeals. He states that the Personnel Unit failed to bring his case to the Meritorious Increase Committee, while other staff cases were brought forward during that same period.

The Organization's argument that its effective date of promotion practice had been an "oversight" does not address the "main issue [of] why the promotions in SEARO had not been concurrent ... with reassignment before, and why the Personnel Officer now, in the case of [the complainant], abruptly wanted it to be concurrent ... with reassignment".

He states that personal prejudice is difficult to establish, but the cumulative effect of these alleged actions is proof of continued personal prejudice on the part of the Personnel Officer. At both levels of appeal the challenged decision focused on the incorrect dates of promotion and eligibility for spouse allowance, which are of lesser importance, and not on the larger issue of prejudice. He asks that his appeal be heard in its entirety.

E. In its surrejoinder, the Organization says that the complainant's many allegations of "continued prejudice" which he presents in his rejoinder, must, according to Rule 1230.1, be submitted against a specific "administrative action or decision affecting his appointment status". If the complainant had objections, he should have challenged these decisions at the given time and under normal appeal procedures.

The fax of 4 May 1993 regarding United Nations peacekeeping vacancies was transmitted along with forty applications, including that of the complainant, and stated that "some of the applicants are working here at junior levels and may not stand fit to your requirements for senior positions" and as such, did not "kill" the prospects of all of the applicants. Further, since the complainant was working as a senior staff member at the time, the comment did not relate to him. This is not evidence of alleged personal prejudice against him.

With respect to the award of a double meritorious increase, the recommendation to grant it was not processed because the Personnel Unit had initiated action to review the post in the Leprosy Unit for which the complainant was selected.

CONSIDERATIONS

1. The complainant contests a decision of the Director-General of the World Health Organization, his employer, endorsing a recommendation of the headquarters Board of Appeal to dismiss an appeal against a decision of the Regional Director of SEARO to accept the recommendation of the regional Board of Appeal that the complainant's initial appeal should be dismissed.

2. In his complaint, the complainant cites and seeks review of two specific administrative decisions relating first to the effective date of his promotion from grade ND.8 to ND.X, and second the effective date upon which he became entitled to receive a spouse allowance. In a third part of the complaint, the complainant alleges that he has suffered moral and material injury as a result of being a victim of prejudice and malfeasance on the part of SEARO and of certain officials at SEARO; he cites a large number of alleged incidents presumably in support of the allegation of prejudice and malfeasance.

3. The Organization pleads that the complaint is irreceivable. With respect to the first of the two specific administrative decisions as identified under 2, this plea is based on the failure of the complainant to file his internal appeal to the regional Board of Appeal within the time limit specified in Staff Rule 1230.8.3, i.e. within sixty calendar days from the time that the relevant administrative decision was notified to him.

4. Both the regional Board and the headquarters Board of Appeal made a specific finding that the appeals were receivable but the Tribunal's case law establishes that notwithstanding such findings it is still open to the Organization to submit the question of the receivability of the internal appeal to the Tribunal. A complainant who has not brought an internal appeal in accordance with the applicable staff rules and within the specified time limit has not fully exhausted his internal means of redress and his complaint is irreceivable within the terms of Article VII of the Tribunal's Statute (see Judgment 575, *in re* Schulz).

5. The complainant was clearly advised of the Administration's position regarding the effective date of his promotion by a memorandum from the Personnel Unit dated 29 August 1995. That memorandum was followed by a personnel action form issued on 10 October 1995 giving effect to the Administration's position. Even if 10 October 1995 were the effective date, the internal appeal would still have been out of time.

6. The complainant attempted to reopen the question by means of memoranda addressed to the Personnel Unit on 2 May and 17 May 1996 but

the Administration made it clear by a response dated 23 May 1996 that it considered that a final decision had already been taken and that the matter was closed.

7. The complainant's appeal to the regional Board of Appeal was brought only in June 1996. Manifestly it was out of time and is irreceivable.

8. The same is true of the second plea regarding the spouse allowance. The complainant was advised on 2 June 1995 of the retroactive increase in salary scale to take effect from 1 July 1994. If that retroactive increase had the result of creating for the complainant an entitlement to a spouse allowance for the year 1994 it was for him to inform the Administration of his wife's earnings during the relevant period and to make a claim for the allowance. For this claim to be receivable he should have filed it within sixty days of the date the new salary scale was notified to him. He filed his appeal in June 1996. It is out of time and irreceivable.

9. With regard to the third part of the complaint the situation is somewhat different although the result is the same.

10. The complainant appears to confuse personal prejudice and malfeasance as a ground upon which an administrative decision may be found to be tainted and therefore subject to be set aside, and such personal prejudice and malfeasance as a cause of action giving rise to a civil claim for damages for moral or material injury.

11. The Tribunal's jurisdiction is limited to the review of administrative decisions taken by international organisations affecting the employment conditions of their employees. Where such decisions are found to be reviewable and where they have caused harm, the Tribunal will exercise its jurisdiction to order reparation thereof. The Tribunal is not, however, a civil court of general jurisdiction in matters of delict and contract. Even where they may be causally related to injury suffered by someone, prejudice and malfeasance do not give rise to a claim for damages before the Tribunal unless they can be related to a specific administrative decision which has become final and against which the complainant has exhausted all available internal remedies.

12. Without exception, the incidents cited by the complainant in the third part of his complaint fall into one of the following categories:

(a) matters in which an internal appeal was launched and withdrawn or otherwise disposed of without any further appeal being taken within the allowable time limits;

(b) matters in which a final administrative decision was taken and no appeal was launched within the time limits allowed;

(c) matters in which there has been no final administrative decision; and

(d) matters invoked by the complainant subsequent to his initial appeal to the regional Board of Appeal and irreceivable as being illegitimate attempts to enlarge the grounds of the complaint.

13. Finally, to the extent that the matters raised in the third part of the complaint may be seen as evidence of personal prejudice admissible for the purposes of impugning the two administrative decisions earlier identified, the claims relating to those decisions are not receivable and such evidence is accordingly irrelevant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SEVENTH SESSION

***In re* Wassef (No. 27)** **Judgment 1889**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-seventh complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 15 October 1996 the FAO's reply of 19 February 1999, the complainant's rejoinder of 6 March and the Organization's surrejoinder of 12 April 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Information about the complainant's career with the FAO, and the illness he caught while on duty in Chad, is set out under A in Judgments 1401 and 1486 on his first and second, and eighth complaints. Further information relevant to the present complaint may also be found in Judgment 1701 on his twenty-fifth complaint. He left the service of the Organization in January 1994.

On 19 June 1995 the secretary of the Advisory Committee on Compensation Claims wrote to the complainant informing him that the Director-General had endorsed the Committee's recommendation to reimburse the expenses he incurred during his hospitalisation and treatment for hepatitis B and to grant him sick leave on full pay during that period. On

25 July 1995 the secretary notified to him an extract from the Committee's report on his case which said "there is ample evidence that Chad is .... a duty station hazardous to health". By a further notification sent to the complainant on 27 July 1995 the secretary of the Advisory Committee confirmed that the Director-General had accepted the recommendation of the Committee to recognise his illness as service-incurred.

The same day the complainant appealed to the Director-General maintaining that the medical service ought to have vaccinated him against hepatitis B prior to his departure for Chad in 1991; because of the suffering his illness exposed him to he claimed 1.5 million United States dollars in damages. He then sent an almost identical appeal to the Director-General on 2 August 1995, claiming an additional 1.5 million dollars for the "gross negligence of the Medical Service".

The Assistant Director-General in charge of Administration and Finance replied on the Director-General's behalf on 21 September 1995, rejecting those two appeals. On 9 October the complainant filed two internal appeals with the Appeals Committee that it subsequently joined. The Committee reported on 23 May 1996. It was of the opinion that at least on arrival in Chad the complainant had had sufficient information to make "an informed decision" as to the need for vaccination, and it recommended rejection of his claims for compensation. The complainant filed his complaint with the Tribunal on 15 October 1996, challenging the report of the Committee.

B. The complainant contends that his complaint is receivable as the Director-General received the Appeals Committee's report on 23 May 1996, and he had waited a "reasonable time" for the Director-General's final decision before filing his complaint with the Tribunal.

He pleads that as hepatitis B was endemic in Chad there was "gross negligence" on the part of the FAO medical service in not vaccinating him against it before he left on mission there in 1991. The Organization should have paid heed to recommendations laid down by the World Health Organization (WHO) in its general guidelines for vaccination and by the United Nations Development Programme (UNPD) in the 1991 edition of its circular "Country Living Conditions in Chad". Even if no WHO guidelines existed at all the employer organization should still keep its own information on vaccinations up to date. Its failure to vaccinate him was the "root cause" of his daily physical suffering and loss of career prospects.

He faced "exorbitant" interest rates on money he borrowed for financial survival and deplores the "procedural dilatory tactics" on the part of the Administration.

He seeks: an award of 1.5 million dollars in damages; an award of 1.5 million dollars for the Organizations's "inexcusable serious fault"; payment of "a cost of money" equivalent to 24.25 per cent of those sums with effect from 21 September 1995, the date of the reply from the Director-General giving rise to the complainant's internal appeals; and 4,000 dollars in costs.

C. In its reply the FAO argues that the complaint is irreceivable as the complainant filed it before he received a final decision under the terms of Article VII(1) of the Statute of the Tribunal. That decision was sent to him in a letter of 4 November 1996, produced by the Organization with its reply, in which the Director-General informed the complainant that he had endorsed the recommendation of the Appeals Committee to reject his claims for compensation.

His allegation of "gross negligence" by the medical service is the subject of this complaint and his thirtieth which he filed on 2 January 1997 after receiving the final decision from the Director-General, and the Organization asks for joinder of the two cases. This case raises issues which have been dealt with in earlier complaints, and which are therefore *res judicata*. In essence it focuses on the same facts as his twenty-fifth complaint directed against the "wilful misconduct" of the medical service, and which was dismissed by the Tribunal.

On the merits the Organization argues that the complainant has adduced no evidence of alleged "gross negligence" in not vaccinating him against hepatitis B in 1991, and rebuts his claim to damages on that score. It relied on the WHO guidelines which it regarded as the "most authoritative information available" at the time. According to the 1991 version of that document vaccination against hepatitis B should be "considered", it was only in the 1993 version of those guidelines that it became "indicated".

In coming to his final decision the Director-General relied on a memorandum prepared by the chief medical officer after the Appeals Committee had reported its findings. The medical officer drew attention to the difference between vaccinations requested at the point of entry into a country "to protect countries from the importation of diseases" and vaccinations given for personal protection. Although the medical service does provide vaccination for individual protection, it did not consider that the complainant came within the groups of persons at risk, who warranted extra protection, referred to in the WHO guidelines.

D. In his rejoinder the complainant presses the arguments "submitted in all [his] previous cases". He also asks the Tribunal: (a) to impose a monthly penalty in the event of the Organization not implementing the Tribunal's decision within thirty days from the date of the judgment; (b) to award him all his rights, entitlements and damages claimed including granting him a post at headquarters "in accordance with the Rules and Regulations for those incapacitated as a result of a service-incurred illness" or a post in a European or North American office of the Organization; (c) the immediate payment of his "due salaries" from 1 October 1993 to the date of the judgment and at P.4 level; and (d) the "restoration of [his] status and granting of permanent/continuing appointment in addition to the complete restoration of [his] pension and disability rights ... as well as the payment of all due indemnities, compensations and benefits under all schemes" in relation with his service-incurred illness "including but not limited to insurance entitlements, medical coverage".

E. In its surrejoinder the Organization draws attention to a statement made by the complainant in his rejoinder where he says: "There is neither an issue nor an argument which was not ... fully covered in one or more of my previous cases". This is implicit recognition by him that the issues raised in the present case are *res judicata*. It submits that the complaint is devoid of merit.

CONSIDERATIONS

1. As in the twenty-six previous cases filed by this former FAO official and examined by the Tribunal, the present case concerns the circumstances in which the complainant contracted hepatitis B in August 1993, when he was serving in Chad on behalf of the Organization on a United Nations Development Programme (UNDP) project. Finally, after numerous equivocations, which are recalled in certain of the cases already examined, the Administration gave the complainant the "benefit of the doubt" and admitted that his illness should be recognised as service-incurred under Manual paragraph 342 and that the complainant was entitled to the reimbursement of his expenses for medical treatment and hospitalisation and to full pay until the end of his sick leave. The complainant was not content with these measures and has filed numerous complaints claiming compensation for the harm he considers he suffered. The Tribunal has already ruled on these complaints. In Judgment 1701 (*in re* Wassef No. 25), delivered on 29 January 1998, it found that the complainant had not adduced proof of the "wilful misconduct" of which he accused the medical service and dismissed his claim that the Organization should pay him two million dollars.

2. While, in the above case, the complainant made vague allegations concerning the misconduct or negligence of the medical service, he has also levelled more detailed criticisms of the fact that he had not been warned before his departure for Chad in 1991 of the risk of contracting hepatitis B and had not been vaccinated against the illness, which is endemic in many African countries, and particularly in Chad. He appealed twice, on 27 July and 2 August 1995, to the Director-General of the FAO, who rejected his claims. In a report of 23 May 1996, the Appeals Committee considered that the complainant had been provided with sufficient information, at least on his arrival in Chad, to make an informed decision as to whether to be vaccinated and that his requests for financial compensation were unfounded. The Appeals Committee nevertheless recommended to the Director-General that staff members should be provided with information allowing them to take all the necessary medical precautions and that the medical service be instructed to be more vigilant in this regard so that "such unfortunate cases

can be avoided in the future". The Director-General took his final decision on 4 November 1996. He refuted any allegation of negligence by the medical service and confirmed his previous decision dismissing the claims for compensation made by the complainant.

3. On 15 October 1996, he filed a complaint with the Tribunal seeking the quashing of the Director-General's decision, which was not as yet an explicit decision. He also filed another complaint (No. 30), challenging the decision of 4 November 1996: see Judgment 1890 issued this day.

Receivability

4. The Organization challenges the receivability of the complaint, which it considers premature, but does not press its claim. However, it is clear that, in view of the time delay since he lodged his appeal, the complainant had legitimate grounds for considering that it had been dismissed. The complaint can therefore be examined on its merits.

Res judicata

5. The Organization submits that the complainant's claims concern issues which have already been resolved by the Tribunal, particularly in Judgment 1701 referred to above. However, even though the complainant himself believed it necessary to emphasise in his rejoinder that there is neither an issue nor an argument which has not been "discussed, documented and fully covered" in one of his previous cases, the question of the responsibility of the Organization for the non-vaccination of the complainant is new. The Tribunal will therefore examine the merits of the pleas and dismisses the Organization's submission of *res judicata*.

The merits

6. The opinion of the Appeals Committee is not totally unfavourable to the complainant's pleas, even though it recommends the dismissal of his claims. The Appeals Committee emphasises that, in view of the fact that

hepatitis B is highly endemic in Chad, it is in the interests of staff members and of the Organization that the relevant vaccination be provided, irrespective of whether or not it is requested on entry into the country. The Appeals Committee considers that the medical service did not completely fulfil its role and did not offer the staff member concerned the advice that it could have supplied. The Appeals Committee even refers to responsibility being "equally shared".

7. In practice, there could be no grave fault of the medical service incurring the responsibility of the Organization unless the protective measures recommended by a competent authority had been disregarded. In the material case, the Organization demonstrates that in 1991, the year in which the complainant was assigned to Chad, the World Health Organization's guidelines did not specifically recommend vaccination against hepatitis B for persons posted to African countries affected by an endemic illness of this type. Moreover, the complainant would not appear to be in a category of persons at risk, for whom vaccinations were recommended. Nor is it denied that the complainant, who was assigned to a UNDP project, was aware at least upon his arrival in Chad, of a UNDP circular which advised vaccination. As emphasised by the Appeals Committee, he was therefore informed of the risks incurred and the precautions that could be taken.

The complainant does not adduce proof of either the negligence or the wilful misconduct of which he accuses the medical service. The Tribunal must therefore dismiss his pleas and his claims for the payment of three million dollars, as well as 24.25 per cent of that amount in compensation for the interest on the sums that he had to borrow. The various other claims pressed both in the complaint and the rejoinder, which reiterate those already made in other cases, are also dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SEVENTH SESSION

***In re* Wassef (No. 30)**

Judgment 1890

THE ADMINISTRATIVE TRIBUNAL,

Considering the thirtieth complaint filed by Mr Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 2 January 1997 and corrected on 14 February 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATION

This complaint, which challenges the decision of the Director-General of the FAO of 4 November 1996 refusing to grant the complainant compensation for the injury he suffered as a result of the failure to vaccinate him against hepatitis B and the gross negligence on the part of the FAO's medical service, is based on the same arguments as those disallowed in Judgment 1889 delivered today. The complaint is manifestly devoid of substance and the Tribunal rejects it forthwith in accordance with the provisions of Article 7 of its Rules.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SEVENTH SESSION

***In re* Gramegna (Nos. 3 and 4)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third and fourth complaints filed by Mr Marco Antonio Gramegna against the International Organization for Migration (IOM) on 27 July 1998, the IOM's single reply of 29 September, including comments invited by the Tribunal from Mr Jean-Paul Chardin and Ms Sigrid Kaag, the complainant's rejoinder of 17 November 1998 and the Organization's surrejoinder of 28 January 1999;

Considering that by a letter of 4 March 1999 the complainant informed the Registrar of the Tribunal that he wished to withdraw suit;

Considering that by a letter of 11 March 1999 the Organization informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

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